

CASE NO. 22-1750

**IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT**

GARY NESTLER, on behalf of themselves and all others similarly situated; VIEWED STUDENT FEMALE 200, on behalf of themselves and all others similarly situated; VIEWED STUDENT MALE 300, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

v.

THE BISHOP OF CHARLESTON, a Corporation Sole;
BISHOP ENGLAND HIGH SCHOOL; TORTFEASORS, 1 - 10;
THE BISHOP OF THE DIOCESE OF CHARLESTON, in his official capacity; ROBERT GUGLIELMONE, individually,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA AT ABINGDON

**JOINT APPENDIX - VOLUME III OF III
(Pages 1111 - 1659)**

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In the Matter of:

**TUITION PAYER 100, VIEWED STUDENT
FEMALE 200, VIEWED STUDENT MALE 300,
ET AL**

VS.

**THE BISHOP OF CHARLESTON, A
CORPORATION SOLE, BISHOP ENGLAND
HIGH SCHOOL, ET AL**

Maria Y. Williams

October 25, 2021



UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

30(b)(6) DEPOSITION OF WEST ASHLEY HIGH SCHOOL

TUITION PAYER 100, VIEWED STUDENT FEMALE 200,
VIEWED STUDENT MALE 300, ON BEHALF OF THEMSELVES
AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

vs. C/A: 2-21-cv-00613-RMG

THE BISHOP OF CHARLESTON, A CORPORATION SOLE, BISHOP
ENGLAND HIGH SCHOOL, TORTFEASORS 1-10, THE BISHOP OF
THE DIOCESE OF CHARLESTON, IN HIS OFFICIAL CAPACITY,
AND ROBERT GUGLIELMONE, INDIVIDUALLY,

Defendants.

DEPONENT: MARIA YVETTE WILLIAMS

DATE: October 25, 2021

TIME: 10:00 AM

LOCATION: CHARLESTON COUNTY SCHOOL DISTRICT
75 Calhoun Street
Charleston, SC 29401

REPORTED BY: NANCY ENNIS TIERNEY, CSR (IL)

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A P P E A R A N C E S

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Witness Sworn

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EXAMINATION

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By Mr. Halversen

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By Mr. Dukes

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Certificate of Reporter

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E X H I B I T S

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No exhibits were marked.

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1 MARIA YVETTE WILLIAMS, having been first
2 duly sworn, testified as hereinafter set forth.

3 EXAMINATION

4 BY MR. HALVERSEN:

5 Q. Good morning, Ms. Williams.

6 **A. Good morning.**

7 Q. I just introduced myself. My name is Brent
8 Halversen, and I, along with Anna Richter here,
9 represent the plaintiffs in this lawsuit that has been
10 filed against Bishop England.

11 Have you ever had your deposition taken
12 before?

13 **A. No, sir.**

14 Q. So basically it's just like we are in court,
15 except we're not. So this court reporter here is taking
16 down what you're saying, and you have taken an oath to
17 tell the truth.

18 If you don't understand my question, I will
19 be happy to rephrase it. If you want to take a break,
20 you can take a break, although I think we're going to be
21 done probably in 20 or so minutes. So we're going to be
22 pretty quick, based on all the previous depositions.
23 They were all pretty quick.

24 Do you have any questions for me?

25 **A. No, sir.**

Spectrum Court Reporting and Legal Video
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JA1116

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1 Q. Okay. Could you please state your full name for
2 the record?

3 **A. Maria Yvette Williams.**

4 Q. And you work for West Ashley High School?

5 **A. Yes, sir.**

6 Q. What is your position there?

7 **A. Social studies teacher.**

8 Q. And how long have you been in that position?

9 **A. Since the school opened.**

10 Q. When was that?

11 **A. In 2000.**

12 Q. The year 2000?

13 **A. Yes. Well, I have been in that district. I have**
14 **taught at St. Andrews and Middleton, and then they**
15 **combined. So I've been over there since really '87.**

16 Q. Oh, wow. Okay.

17 **A. Yeah. And then they combined and made West**
18 **Ashley High.**

19 Q. And when did West Ashley High open?

20 **A. We moved into the building in 2000.**

21 Q. In 2000. Okay. And you have been there
22 continuously ever since?

23 **A. Yes, sir.**

24 Q. And in the same role, as a social studies
25 teacher?

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1 **A. Yes.**

2 Q. And have you been a coach or a PE teacher?

3 **A. Coach.**

4 Q. What do you coach?

5 **A. Basketball.**

6 Q. Boys and girls?

7 **A. Just girls.**

8 Q. Just girls' basketball.

9 And you've coached basketball since then

10 or --

11 **A. Yes.**

12 Q. The whole time?

13 **A. Yes. Well, not there, not there, because I've**
14 **been at James Island prior. I didn't get to West**
15 **Ashley -- I didn't coach at West Ashley until '04.**

16 Q. Okay. So you started coaching at West Ashley in
17 2004?

18 **A. Right.**

19 Q. But you have been there since 2000 teaching
20 social studies?

21 **A. Yes.**

22 Q. Got you. So we sent a Notice that had a list of
23 topic areas, and you were designated the person that
24 would have the most knowledge of these topic areas.

25 Have you had a chance to look at those topic

Maria Y. Williams - 10/25/2021

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1 areas?

2 **A. Yes.**

3 Q. And I will just read the first one, which is
4 persons who can testify as to when any or all of the
5 locker rooms were covered up.

6 What knowledge do you have on that subject?

7 **A. I could only speak on my office, the girls'**
8 **basketball locker room. I don't know about the PE rooms**
9 **and stuff, only that.**

10 Q. What about the girls' locker room?

11 **A. For basketball, the girls' basketball? Yeah,**
12 **that's what I'm talking about.**

13 Q. Well, actually let's just back up so we have an
14 understanding of what we're talking about.

15 So there is the PE locker rooms?

16 **A. Yes.**

17 Q. And then are there varsity or junior varsity or
18 just varsity? I'm not sure.

19 **A. Both.**

20 Q. There is both?

21 **A. Yeah.**

22 Q. Are the varsity locker rooms bigger or are they
23 the same?

24 **A. Compared to --**

25 Q. Each other.

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1 **A. -- the PE locker rooms?**

2 Q. Sure.

3 **A. No.**

4 Q. The PEs are bigger?

5 **A. Yes.**

6 Q. Okay. And is it -- the PE locker rooms are on
7 one side of the basketball court, and then is the
8 varsity and JV locker rooms on the other side of the
9 court?

10 **A. No.**

11 Q. No? Where are they located?

12 **A. On the same side, according to how our gyn is set**
13 **up. You have boys on one said and then the girls on the**
14 **other.**

15 Q. Okay. I'm with you. So the girls'-- you're
16 familiar with the girls' locker room obviously.

17 Have you ever been into the boys' locker
18 rooms?

19 **A. Huh-huh, to the door, to the door, and I yell**
20 **coach.**

21 Q. Do you know anybody that would know whether the
22 locker -- whether the viewing windows in the boys'
23 locker room were ever covered up or obscured?

24 **A. You would have to -- you would have to ask the**
25 **coach that, the former couch that was there. I don't**

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1 know. Because, like I say, me and my staff, we didn't
2 go there.

3 Q. I understand.

4 A. So I don't know what they did over on that side.

5 Q. Who is the current coach over there?

6 A. I couldn't tell you.

7 Q. Okay.

8 A. I'm just -- since retiring from it, I've stepped
9 away from it, so I'm just strictly on teaching. And
10 once my job is done in the day --

11 Q. You're out of there?

12 A. -- I'm out the door.

13 Q. I got you. Fair enough.

14 So I think you were saying the girls' locker
15 rooms, they have had -- or correct me if I'm wrong.
16 There is some obscurement or covering of these windows?
17 Yes?

18 A. Yes.

19 Q. And how long has that condition been that way?

20 A. Ever since I took over.

21 Q. So that would be 2004?

22 A. Uh-huh.

23 Q. It looks like in some of those areas on the
24 girls' side there was like a retractable monolithic
25 screen you could pull down.

Maria Y. Williams - 10/25/2021

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1 Has that always been there or -- no?

2 A. No.

3 Q. Do you know what I'm talking about?

4 A. Yeah, because we have them in the classroom; but
5 no.

6 Q. You don't know when that was installed?

7 A. I don't know. I don't know if they just
8 installed that. Like I said, I haven't been -- since
9 leaving I have not been -- I haven't even been in that
10 locker room since leaving.

11 Q. When did you leave?

12 A. About three years ago when I retired, so I don't
13 know what's in there now.

14 Q. 2018 or so you left?

15 A. Uh-huh.

16 Q. And are you teaching now?

17 A. Uh-huh.

18 Q. Where are you now?

19 A. I'm still there.

20 Q. Oh, okay. You said you retired.

21 A. No, basketball, coaching.

22 Q. You're done with coaching?

23 A. Coaching, done with coaching. Yeah, I still
24 teach.

25 Q. I understand. One of our topic areas is persons

Maria Y. Williams - 10/25/2021

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1 who can testify as to why some locker rooms in the
2 girls' varsity are covered and others are not covered.

3 Are there some on the girls' side that
4 aren't covered?

5 A. I don't know. The only thing I can attest to is
6 the girls' basketball locker room, that's it, and the
7 office. So you have varsity here. Well, we divided it.

8 So you have a varsity side, and then it's
9 the office, my office where me and my coaches would be,
10 and then on the other side is the JV. We covered our
11 windows. We kept our windows covered. So I don't know
12 what anybody else did.

13 Q. And from what you said, it was always covered
14 since you were there?

15 A. Yes, sir.

16 Q. And when you were there, were you still able to
17 ensure the safety of the students in the locker room
18 even though the windows were covered?

19 A. Uh-huh.

20 Q. Yes?

21 A. Yes. Sorry.

22 Q. And did you have any incidents or disciplinary
23 issues while you were there in the locker rooms that you
24 recall?

25 A. No.

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1 Q. They were good girls?

2 A. They were girls, you know, teenagers. But, I
3 mean, as incidents for like fighting, incoming -- no,
4 not like that. I mean, whatever incidents we had, we
5 would take it to the court, sat around, talk about it,
6 whatever we needed to do.

7 I mean, really, our locker room was just
8 basically come in and change for practice, change for
9 the game and we're out.

10 Q. Do you agree with me that students in the locker
11 rooms have a reasonable expectation to privacy?

12 MR. DUKES: Object to the form.

13 A. Yeah.

14 Q. (BY MR. HALVERSEN): Just to clarify what you
15 told us before, you didn't cover those windows, they
16 were already covered when you got there?

17 A. No. My assistant coach would make sure they are
18 covered. I would tell them, look, we need to -- when it
19 was our time for the locker room, the season started, we
20 made sure we covered. So I would say, hey, get the
21 windows covered.

22 Q. Oh.

23 A. So I don't know what the other girls' coaches
24 did, anybody did in the girls' locker room. I can only
25 say this, because that was my level of comfort, go ahead

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1 and cover them.

2 Q. And so you made sure that they were covered? Is
3 that what you're saying?

4 A. Yes.

5 Q. Why was that?

6 A. Privacy.

7 Q. In your locker room, because that's the one you
8 were telling me you were familiar with, was it possible
9 to view the students, the girls in that locker room
10 without them knowing?

11 A. No.

12 Q. Thank you, Ms. Williams. That's all I have for
13 you. Mr. Dukes may have some questions for you.

14 A. Oh, okay.

15 EXAMINATION

16 BY MR. DUKES:

17 Q. How many students would be in the locker room at
18 any given time when they were changing clothes?

19 A. Well, the team had a team of 13. Some would
20 change right there in the locker room and some would go
21 in the shower area, because we had a shower area. And
22 then some would just go out in the bathroom to change.
23 Just their personal -- some of them, I guess, didn't
24 feel comfortable undressing in front of each other so
25 they just -- but it would depend on the time frame for

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1 practice.

2 Some would get there early, change, go out
3 on the floor, others would come in. So as long as they
4 were on the floor by a certain time, I was fine with
5 that.

6 Q. You know, I think that's all I have for you.

7 A. Okay.

8 MR. DUKES: Thank you for coming.

9 MS. RICHTER: Thank you.

10 (The deposition was concluded at 10:09 a.m.)

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1 STATE OF SOUTH CAROLINA)
2)
3 COUNTY OF CHARLESTON)

4 I, Nancy Ennis Tierney, Certified Shorthand Reporter
5 and Notary Public for the State of South Carolina at
6 Large, do hereby certify that the witness in the
7 foregoing deposition was by me duly sworn to testify to
8 the truth, the whole truth and nothing but the truth in
9 the within-entitled cause; that said deposition was
10 taken at the time and location therein stated; that the
11 testimony of the witness and all objections made at the
12 time of the examination were recorded stenographically
13 by me and were thereafter transcribed by computer-aided
14 transcription; that the foregoing is a full, complete
15 and true record of the testimony of the witness and of
16 all objections made at the time of the examination; and
17 that the witness was given an opportunity to read and
18 correct said deposition and to subscribe the same.

19 Should the signature of the witness not be affixed to
20 the deposition, the witness shall not have availed
21 himself/herself of the opportunity to sign or the
22 signature has been waived.

23 I further certify that I am neither related to nor
24 counsel for any party to the cause pending or interested
25 in the events thereof.

26 Witness my hand, I have hereunto affixed my official
27 seal this 6th day of November, 2021, at Charleston,
28 Charleston County, South Carolina.

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35 _____
Nancy Ennis Tierney, CSR (IL)
My Commission Expires:
June 12, 2024

EXHIBIT 16

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

C/A No.: 2:21-cv-00613-RMG

Gary Nestler, Viewed Student Female 200,
Viewed Student Male 300, on behalf of
themselves and all others similarly situated,

Plaintiffs,

vs.

The Bishop of Charleston, a Corporation Sole,
Bishop England High School, Tortfeasors 1-
10, The Bishop of the Diocese of Charleston,
in his official capacity, and Robert
Guglielmone, individually,

Defendants.

**DEFENDANT BISHOP ENGLAND HIGH
SCHOOL'S SUPPLEMENTAL ANSWERS
TO PLAINTIFFS' FIRST
INTERROGATORIES**

By way of general objection to Plaintiff's discovery requests, Bishop England High School is an operation and ministry of Bishop of Charleston, a Corporation Sole, and has no separate existence from the Corporation Sole. Subject to and without waiving the stated objections, said Defendant supplements its answers Plaintiffs' First Interrogatories as follows:

SUPPLEMENTAL ANSWERS TO PLAINTIFFS' FIRST INTERROGATORIES

8. Please state all disciplinary infractions that have occurred in any of the dressing rooms and/or locker rooms from 1998 to date, stating the type of infraction, how it was discovered, whom the infraction was reported to, and the disposition of the infraction.

SUPPLEMENTAL ANSWER:

Pursuant to Rule 33(d), Plaintiff is referred to the incident reports that have been produced.

9. Please state all disciplinary infractions that have occurred in any of the bathroom facilities from 1998 to date, stating the type of infraction, how it was discovered, whom the infraction was reported to, and the disposition of the infraction.

SUPPLEMENTAL ANSWER:

Pursuant to Rule 33(d), Plaintiff is referred to the incident reports that have been produced.

10. For Interrogatories #8 and #9, were these incidents reported to the appropriate BEHS authority, Diocesan authority, or police/law enforcement/or government agency?

SUPPLEMENTAL ANSWER:

Yes.

14. Please describe, including by name, date, location, and total earnings, every gambling event or activity engaged in by or for the benefit of BEHS or any of its affiliated entities for the time period of 1998 to date.

SUPPLEMENTAL ANSWER:

Subject to and without waiving the previously-stated objections,

The Triple B Club for Bishop England High School is a registered 501(c)(3) entity that operates as a booster organization. The Club is separately incorporated and is independent from the Diocese or Bishop England High School, who exercise no supervision or control over the Club. The Club has employed a number of fundraising techniques to facilitate donations to Bishop England High School, including a raffle. In accordance with Diocesan policy prohibiting games of chance, BEHS students are not permitted to sell Club raffle tickets and tickets are not sold on Diocesan property.

15. To the extent respondent hereto claims that acts described in response to the preceding interrogatory were not illegal acts, please state with specificity the reason or reasons for such claim or claims.

SUPPLEMENTAL ANSWER:

Defendant objects to Interrogatory No. 15 because BEHS cannot provide a legal opinion regarding The Triple B Club's compliance with state or federal law.

16. State the total amount of tuition that was paid per year to BEHS for the time period beginning with the 1998-1999 school year through the 2018-2019 school year.

SUPPLEMENTAL ANSWER:

1998-99 \$3,449,850	1999-2000 3,754,970	2000-2001 8,884,050	2001-2002 \$4,235,500	2002-2003 \$4,386,900
2003-2004 4,596,000	2004-2005 \$4,813,950	2005-2006 \$5,120,150	2006-2007 \$5,254,820	2007-2008 \$5,529,800
2008-2009 \$5,746,260	2009-2010 \$5,746,260	2010-2011 \$5,159,300	2011-2012 \$5,667,924	2012-2013 \$5,913,767
2013-2014 \$6,097,390	2014-2015 \$6,704,000	2015-2016 \$7,000,000	2016-2017 \$7,025,400	2017-2018 \$6,959,400
2018-02019 \$7,476,000				

20. Please name each person who was enrolled at BEHS during the years 1998 through 2019 and for each please state the address at the time during which he/she was a student there, the last known address, email address, and telephone number (cell phone and land line).

SUPPLEMENTAL ANSWER:

Subject to BEHS's previously stated objection, the annual enrollment for BEHS was as follows:

1998 – 892	1999 - 892	2000 – 883	2001 – 910	2002 – 896
2003 – 872	2004 – 861	2005 – 860	2007 – 838	2008 – 832
2009 – 817	2010 – 729	2011 – 677	2012 – 669	2013 – 677
2014 – 715	2015 - 728	2016 – 700	2017 – 670	2018 – 684
2019 – 675	2020 - 685			

TURNER, PADGET, GRAHAM & LANEY, P.A.By: s/Richard S. Dukes, Jr.

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ATTORNEYS FOR DIOCESE DEFENDANTS

October 22, 2021
 Charleston, South Carolina

EXHIBIT 17

=====

Deposition of:

Male Student

=====

Gary Nestler, et al
v.
The Bishop of Charleston, a Corporation Sole, Bishop
England High School, et al

Case #: 2:21-cv-00613-RMG

October 4, 2021

=====



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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Gary Nestler, Viewed CASE NO. 2:21-cv-00613-RMG
Student Female 200,
Viewed Student Male
300, on behalf of
themselves and all
others similarly
situated,

Plaintiff(s),

-vs-

The Bishop of Charleston,
a Corporation Sole,
Bishop England High School,
Tortfeasors 1-10, The Bishop
of the Diocese of Charleston,
in his official capacity, and
Robert Guglielmone, individually,

Defendant(s).

DEPOSITION OF: MALE STUDENT

DATE TAKEN: MONDAY, OCTOBER 4, 2021

TIME: 1:58 P.M.

PLACE: TURNER PADGET GRAHAM LANEY, PA
40 Calhoun Street, Ste. 200
Charleston, SC 29401

REPORTED BY: Nicole D. White
Certified Court Reporter
Notary Public

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1 A P P E A R A N C E S

2

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6 and

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I N D E X

TESTIMONY OF MALE STUDENT

By Mr. Dukes.....04

CERTIFICATE OF REPORTER.....37

ERRATA SHEET.....38

E X H I B I T S

(No exhibits were marked or offered.)

STIPULATIONS

It is hereby stipulated and agreed by and
between the parties hereto, through their
respective counsel, that the reading and signing
of the transcript is reserved by the Deponent.

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1 (MALE STUDENT, having been first duly
2 sworn, testified as follows:)

3 E-X-A-M-I-N-A-T-I-O-N

4 BY MR. DUKES:

5 Q. Good afternoon, Tomas.

6 A. Good afternoon.

7 Q. I'm Richard Dukes. I'm the lawyer
8 representing the Diocese in the case you brought.

9 A. Uh-huh.

10 Q. I know you heard -- listened in on
11 when I deposed your sister and it will go more or
12 less the same.

13 A. (Indicating).

14 Q. There are a few rules that I'm
15 required to tell you about. First, that if you
16 don't understand one of my questions, you have to
17 ask me to clarify.

18 A. (Indicating).

19 Q. Back in the old days when these two
20 started practicing, the witness could turn to the
21 lawyer and say, what's he asking me, and then the
22 lawyer would explain it and they put a stop to
23 that.

24 MR. RICHTER: If we explain
25 something, though, listen closely.

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1 BY MR. DUKES:

2 Q. Another rule is that now that your
3 deposition has started, if we take a break, you
4 can't talk to anybody about the substance of your
5 testimony and I can ask you about that.

6 A. (Indicating).

7 Q. Our court reporter would appreciate it
8 if you'd answer my questions out loud and it
9 didn't seem like your sister and I had a problem
10 with talking over each other, but she would also
11 appreciate it if you would let me finish asking
12 my question and then I'll let you finish
13 answering my question.

14 A. Okay.

15 Q. If you don't understand one of my
16 questions, just let me know and I'll rephrase.

17 A. (Indicating).

18 Q. Tell me, where do you live now?

19 A. 154 Sancho (ph) Drive.

20 Q. And where is that?

21 A. It's Daniel Island, more or less. St.
22 Thomas Island, technically.

23 MR. RICHTER: Rich, I'm sorry, I
24 know I stepped out. Did you tell him about
25 him controlling breaks and if he needs

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Male Student - 10/4/2021

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1 anything and that sort of stuff?

2 MR. DUKES: Yeah.

3 MR. RICHTER: The reason I do
4 this is because that includes lunch. If
5 somebody is hungry, for example, if the
6 witness is hungry, it's on Rich to bring
7 lunch in for all of us.

8 MR. DUKES: Unfortunately,
9 Hall's Chophouse is not open for lunch.

10 BY MR. DUKES:

11 Q. Do you live alone or do you live with
12 somebody?

13 A. With my parents.

14 Q. Are you in school?

15 A. No, sir.

16 Q. Are you working?

17 A. I am.

18 Q. Where are you working?

19 A. At the Charleston County Registrar of
20 Deeds as well as the Charleston Bike Taxi.

21 Q. What do you do for the Registrar of
22 Deeds other than register deeds?

23 A. As well as I prep satisfactions of
24 mortgages, as well as assignments of rents and
25 assignment of mortgages.

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Male Student - 10/4/2021

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1 Q. Okay. And how often do you drive for
2 the Bike Taxi?

3 A. I bike two to three shifts, which can
4 be seven to eight hours each. Two to three
5 shifts a week.

6 Q. Is your job at the Registrar of Deeds
7 part time?

8 A. Full time.

9 Q. Okay. Did you graduate from college?

10 A. Yes.

11 Q. And where did you graduate?

12 A. College of Charleston.

13 Q. What year did you graduate?

14 A. May of 2021.

15 Q. Oh, so recent graduate?

16 A. Yes.

17 Q. What's your degree in?

18 A. Political science and Spanish.

19 Q. When did you attend Bishop England
20 High School?

21 A. 2012 to 2016.

22 Q. And I assume you graduated from there?

23 A. Yes.

24 Q. Did you ever encounter a man named
25 Jeffrey Scofield?

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1 A. Yes.

2 Q. Tell me about that.

3 A. He would sub in when there was no
4 other subs available and if it was a last-minute
5 thing. He worked in the office doing work there
6 and he also did things with sports.

7 Q. Did he ever have any -- did you play
8 sports?

9 A. I did, my freshman year.

10 Q. And what did you play?

11 A. Soccer.

12 Q. Did you ever take P.E., physical
13 education?

14 A. I did, as it was mandatory for every
15 student.

16 Q. That's your sophomore year?

17 A. Yes, sir.

18 Q. Have you ever filed suit against
19 anybody other than this one?

20 A. No.

21 Q. What about, have you ever been sued?

22 A. No.

23 Q. Have you ever been arrested?

24 A. No.

25 Q. Have you ever been charged with a

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1 crime?

2 A. Nope.

3 Q. Are you on any sort of medication that
4 would affect your memory today?

5 A. No.

6 Q. Did you -- I'm gonna turn to talking
7 for a little bit about the locker rooms at Bishop
8 England.

9 A. Okay.

10 Q. When you played soccer, did you ever
11 change clothes in the locker room?

12 A. No.

13 Q. What about when you took physical
14 education?

15 A. Yes.

16 Q. How often did you do that?

17 A. Every day we had P.E., we had to
18 change.

19 Q. And as I recall, one class rotates off
20 of a schedule each week?

21 A. Yes.

22 Q. Was anyone else present when you
23 changed clothes in the locker room?

24 A. Yes, my fellow classmates.

25 Q. Was anybody next to you?

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1 A. Yes, my classmates.

2 Q. How many people would have been in
3 there?

4 A. Fifteen to twenty.

5 Q. Did you ever see anybody holding a
6 cell phone in the locker room?

7 A. Yes.

8 Q. How often was that?

9 A. Scarce.

10 Q. Why is that?

11 A. Because B.E. did not allow cell
12 phones.

13 Q. Did anybody ever take a picture in the
14 locker room?

15 A. No.

16 Q. Did you notice the windows that are in
17 the locker room?

18 A. Yes.

19 Q. Describe them for me, please.

20 A. I can't tell you the size. I don't
21 remember the dimensions by fact, but it was a
22 window that went from one office into the locker
23 room with blinds, like the blinds that are in
24 this office.

25 Q. Uh-huh. Did you ever see the blinds

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1 open?

2 A. No.

3 Q. Did you ever go in the coaches' office
4 on the other side?

5 A. No.

6 Q. Did you ever see anyone inside the
7 office looking into the locker room?

8 A. At times.

9 Q. And who did you see?

10 A. But not often. Kenny or Rooney (ph).
11 It was Rooney's office.

12 Q. And that's Coach Cantey?

13 A. Yes.

14 Q. The football coach?

15 A. Yes.

16 Q. How did you see him, were the blinds
17 open?

18 A. I could see the -- I could see that
19 the light was on in the office. And when I would
20 leave the locker room, I would see someone was in
21 the office.

22 Q. So you didn't see them looking into
23 the office from the locker room?

24 A. No.

25 Q. Did you ever see anybody else in one

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1 of the two offices on the boys' side?

2 A. No.

3 Q. Did you ever go on the girls' side,
4 the other side of the gym?

5 A. No.

6 Q. When you saw either Coach Cantey or
7 Coach Rooney sitting in the coaches' office, were
8 you walking down the hall and looking in the
9 window that's in the door?

10 A. The door would be open if I were to
11 have seen them.

12 Q. Okay. Did the door stay open when you
13 were in the office?

14 A. Well, the door was majority --
15 majority of the time it was open when closed into
16 the office.

17 Q. Okay. Did you ever see anyone in the
18 office with the door closed?

19 A. Very scarcely or scarcely.

20 Q. And from the hallway, did you ever --
21 was there ever a time when you could look into
22 the locker room from the hall through the
23 coaches' doorway?

24 A. I never did, so I wouldn't know.

25 Q. Did you ever see anybody else in the

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1 coaches' offices other than Rooney and Cantey?

2 A. Maybe after school some of the
3 football players or the basketball players, but
4 during P.E., no.

5 Q. Did you ever observe somebody staring
6 through the window in the door to the coaches'
7 office?

8 A. Can you repeat the question?

9 Q. Sure. Did you ever see somebody
10 staring into the coaches' office from the hallway
11 with you being in the locker room?

12 A. No.

13 Q. Did you ever complain to anybody about
14 the presence of the windows in the locker room?

15 A. No.

16 Q. And the windows were open and obvious,
17 would you agree with me?

18 A. The windows, what do you mean by,
19 "open and obvious"?

20 Q. You could see if they were there?

21 A. Yeah.

22 Q. And it was obvious that they were
23 windows?

24 A. Yeah.

25 Q. And it was obvious that the windows

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1 were opening into or from the coaches' office,
2 right?

3 A. Yeah, into the locker room.

4 Q. And it's not like these windows were a
5 two-way mirror where if you were looking at it
6 from the locker room, if it would reflect back at
7 you, but somebody on the other side could look
8 in?

9 A. No.

10 Q. And it wasn't concealed in any way,
11 was it?

12 A. Concealed by which means?

13 Q. It was hidden?

14 A. No, it was not hidden, in plain sight.

15 Q. Will you agree with me that given that
16 teenagers -- almost every teenager had a cell
17 phone at the -- when you were a student at B.E.
18 by that time?

19 A. Yes.

20 Q. And at any time they could have --
21 somebody else, some other student could have
22 taken a picture of people in the locker room?

23 A. Possibility, yes.

24 Q. When was the first time you expressed
25 concern that there were windows in the locker

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1 rooms?

2 A. When I heard about -- when I heard
3 about the Jeff Scofield incident.

4 Q. What did you hear about it?

5 A. My mother sent me a text because --
6 she sent me a text with the Live News, Live 5
7 News of the article of Jeff Scofield recording or
8 having footage of boys changing in the locker
9 room.

10 Q. Has anyone ever informed you that you
11 were photographed by any person, not just
12 Scofield, when you were changing clothes in the
13 locker room?

14 A. No, no one has informed me.

15 Q. What did you do when your mother told
16 you about Jeffrey Scofield's arrest?

17 A. I mean, I texted her back, but I had
18 emotions going through my head.

19 Q. What were those emotions?

20 A. Frustration, anxiety, feeling upset
21 for the kids who were -- who were known that they
22 were photographed or videotaped.

23 Q. Okay. What about the people who
24 weren't photographed?

25 A. I felt bad for them, as well.

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1 Q. Why?

2 A. Because they are living in a world of
3 they don't know, which, in some cases, can be
4 worse than knowing.

5 Q. But you also don't know whether
6 anybody else ever took a photograph in the locker
7 room, a student?

8 A. I do not.

9 Q. Does that give you anxiety?

10 A. That a student --

11 Q. Uh-huh.

12 A. -- videotaped or take a photo?

13 Q. Uh-huh.

14 A. Yeah, it gives me anxiety.

15 Q. Okay. What are you afraid of?

16 A. My videos -- photos of me or videos of
17 me being leaked of me, as well as students and my
18 fellow classmates, because as I can see, it was
19 something that was -- that happened when I was
20 there or after my fact. I mean, graduating.

21 Q. And do you know what happened to
22 Scofield's computer and phone and iPad?

23 A. I do. Well, I -- from what I heard
24 from the news, that's all I know.

25 Q. Okay. It's been taken by the attorney

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1 general's office?

2 A. Uh-huh.

3 Q. And it's locked down, nothing that's
4 on it will ever appear.

5 A. But we don't know if it's been on the
6 dark web.

7 Q. Okay.

8 A. Prior to him being convicted.

9 Q. How would you find out?

10 A. I would have -- I wouldn't.

11 Q. Why did you decide to file this
12 lawsuit?

13 A. Because it was imperative that people
14 like me and my fellow classmates have someone
15 stand up for actions like this that happen quite
16 often, as we can see, in environments that it
17 shouldn't, like private institutions where we
18 confide our trust and especially religious
19 institutions where we pay a good sum of money to
20 go.

21 Q. Are you aware if other schools have
22 similar windows in the locker room?

23 A. I'm not aware.

24 Q. What do you want to accomplish with
25 this lawsuit?

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1 A. I want things like this to never
2 happen again. I think I have had damages done to
3 me and I'm sure my fellow classmates have had
4 damages done to them mentally and maybe
5 physically for all, I can't speak on behalf of
6 them.

7 Q. How have you been injured?

8 MR. SOLOMON: I don't know if he
9 was finished, Rich.

10 BY MR. DUKES:

11 Q. I'm sorry.

12 A. Would you want me to finish what I was
13 saying first?

14 Q. Yeah, please.

15 A. So I was saying just that they have
16 mentally and physically probably been damaged and
17 yeah, I think that's it. I think that's where I
18 was going with that.

19 Q. So you think that all the other
20 students at the school would have been damaged by
21 the fact that there was a window in the locker
22 room?

23 A. I can't speak for all, but I can speak
24 for -- yeah, the majority, I'm sure.

25 Q. Why do you say that? Have you talked

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1 to other people you've gone to school with?

2 A. I've spoken to a handful.

3 Q. Who are those?

4 A. Some of my friends.

5 Q. Yeah. Who are they?

6 A. Harrison Killgo (ph) is one of them.

7 Q. Uh-huh.

8 A. And that's all I have off the top of
9 my head.

10 Q. And what does Harrison say about the
11 lawsuit?

12 A. He doesn't know about the lawsuit.
13 Well, I've talked about the lawsuit maybe a
14 little, but not much about the lawsuit. I don't
15 think it's really about the lawsuit. We talked
16 about the Jeff Scofield incident.

17 Q. And what did y'all say?

18 A. No. When the thing happened, I
19 reached out to him or he reached out to me and
20 we've talked about it, saying that it's messed up
21 and that the windows should have never been there
22 to begin with because people were -- have the
23 ability -- staff had the ability to monitor what
24 we were doing and that's a problem in and of
25 itself.

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1 Q. You don't think the staff should be
2 able to monitor what the students are doing?

3 A. Not in the locker room, no.

4 Q. Even if they're fighting or bullying
5 or smoking?

6 A. At that point, someone can step out
7 and say and call for help, if needed. There just
8 shouldn't be a window there.

9 Q. Do you know whether there's a window
10 there or not now?

11 A. There's not, from what I've been told.

12 Q. How did you come to file this lawsuit?

13 A. My mother spoke to the Richters or the
14 Richters spoke to my mom. They asked to meet my
15 mom, and from there, they had a meeting, and then
16 my mother reached out to me and said that they
17 were looking -- that they would like to speak to
18 me, and then I spoke with them, and they informed
19 me, and from there, came.

20 Q. I'm not asking you anything your
21 lawyers told you.

22 A. Uh-huh.

23 Q. So what did your mother talk to The
24 Richter Firm about?

25 A. Just about the whole incident. She

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1 didn't really inform me much, just if I was
2 willing to meet with the lawyers.

3 Q. How did the Richters find your mother?

4 A. Most likely, after her -- after she
5 was in the incident with Bishop England.

6 Q. And that's when she got fired?

7 A. Are you talking about the incident?

8 Q. Yeah.

9 A. That I'm referring to?

10 Q. Yeah.

11 A. Yes.

12 Q. When she posted some -- reposted some
13 information favorable to abortion rights?

14 A. Sure.

15 Q. Okay. Do you know what happened in
16 her case that she brought?

17 A. Yes.

18 Q. What happened?

19 A. She shared something that had to deal
20 with rights of -- with regarding people taking
21 stances for human rights and she was fired
22 because it went against what the school taught or
23 what they said they taught.

24 Q. And she brought a lawsuit over that,
25 right?

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1 A. Yeah.

2 Q. And what happened with that lawsuit?

3 A. She lost.

4 Q. Did The Richter Firm contact your
5 mother while the case was going on or was it
6 after she lost?

7 A. After, after it was dismissed.

8 Q. Did you do any investigation regarding
9 the windows prior to filing your complaint?

10 A. What are you -- could you clarify what
11 you mean by investigation?

12 Q. Did you research anything?

13 A. I'm not sure what there would be to
14 research about if there was a window there, and
15 that's all there was to it, and I was a part of
16 it.

17 Q. Do you know who designed the window?

18 A. An architect.

19 Q. Do you know why they designed the
20 offices to have windows in the locker room?

21 A. I'm sure they talked with B.E. about
22 it, Bishop England, and the Diocese of
23 Charleston. I'm sure they didn't just do it by
24 themselves.

25 Q. Have you talked to any other -- the

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1 alumni of the school or students about the case?

2 A. No.

3 Q. Have you talked to any parents of B.E.
4 students about the lockers in the locker room or
5 the windows in the locker room?

6 A. No.

7 Q. When's the last time you went in one
8 of those locker rooms?

9 A. In Bishop England --

10 Q. Uh-huh.

11 A. -- in particular? Ever since I've
12 graduated, I have not gone back.

13 Q. Have you ever exchanged e-mails or
14 text messages with anybody about this lawsuit
15 other than your attorneys?

16 A. No.

17 Q. Have you received any communication
18 from the school regarding the lawsuit?

19 A. Nope. Never an apology or anything
20 either.

21 Q. Have you ever posted on any social
22 media about your lawsuit?

23 A. No.

24 Q. What about posting about the situation
25 at B.E. back in 2019?

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Male Student - 10/4/2021

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1 A. No, I have not.

2 Q. How did Bishop Guglielmone injure you?

3 A. He's responsible. He's just -- like I
4 work at the Register of Deeds, and if something
5 were to happen, the elected official who's my
6 boss, if I were to mess up bad, who's gonna be
7 put on the news, it would be him. So he's in the
8 same boat. He's the person in charge and my
9 attorneys are the ones who are in charge of
10 bringing the lawsuit against the people in
11 charge.

12 Q. How do you think that all of the
13 people who have attended B.E. and people who have
14 changed clothes in the locker room are -- have
15 been injured?

16 A. I can't speak for everyone. I'm not
17 gonna generalize everyone's emotions because
18 people feel and think differently. However, I
19 can speak that it has -- it has definitely been a
20 negative impact on my life, and I'm certain
21 that it's been a negative impact on a lot of
22 theirs, and I don't want to get into things that
23 could injure them worse than what they've already
24 suffered.

25 Q. Well, it can't happen again. Windows

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Male Student - 10/4/2021

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1 aren't there.

2 A. But it can happen -- what do you mean?

3 Q. The windows aren't there.

4 A. Yes, and...

5 Q. So why worry about something that
6 can't happen?

7 A. It can happen again. Another building
8 can be constructed and there can be windows there
9 or they can go to another -- they can play
10 another college sport, another sport when they're
11 older and something like that could happen again.

12 Q. So you think, in your opinion, you
13 should never have windows in a locker room?

14 A. No, never.

15 Q. But you don't have a degree in
16 architecture, do you?

17 A. No, but I've been to -- I've played
18 college soccer and I've played in various,
19 multiple locker rooms across the country and I've
20 never seen a window in there.

21 Q. But you would have been there in the
22 visiting team's locker room, right?

23 A. Yep.

24 Q. And there was a coach in the room with
25 you?

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Male Student - 10/4/2021

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1 A. No, not when I was changing. The
2 coaches step out.

3 Q. When did you -- did you meet with
4 Dr. Solis (ph) from Beaufort?

5 A. Yes, on Zoom.

6 Q. On Zoom? And what did y'all talk
7 about?

8 A. We talked about how it affected --
9 well, what I thought about it and how it affected
10 me mentally.

11 Q. When did you see her or see her over
12 Zoom?

13 A. I'd like to say two to three weeks
14 ago.

15 Q. Up until that time, how had the fact
16 that Jeffrey Scofield had photographed other
17 people, how had that impacted your life?

18 A. Because at that -- when I found out,
19 it impacted me because it took away a lot of my
20 innocence at a young age and something that many
21 people go their whole lives without being taken.
22 It forced me to grow up. And I'm not -- it's not
23 only me that I'm speaking for. I'm speaking for
24 the people who have not -- my fellow classmates
25 who don't have the courage or the stamina to

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Male Student - 10/4/2021

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1 stand up for themselves.

2 Q. And you think all of the people who
3 attended Bishop England over the last nearly
4 30 years lack the courage to stand up for
5 themselves?

6 A. Again, I can't speak for every single
7 individual.

8 Q. Has anyone reached out to you to say
9 thank you for bringing this lawsuit?

10 A. No, because I've not spoken to many
11 others, as I do not want my name to be
12 publicized.

13 Q. Are you anxious that one of your
14 fellow students might have photographed you in
15 the locker room?

16 A. Yes.

17 Q. But you hadn't sued them?

18 A. I also don't know if they -- if
19 they've done it or not. I'm not gonna sue on the
20 fact of me not knowing.

21 Q. Okay. You don't know whether anybody
22 took a picture of you in the locker room, do you?

23 A. To my knowledge, I do not.

24 Q. What do you understand are your duties
25 as a class representative?

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1 A. Could you rephrase that?

2 Q. Yeah. What's your job?

3 A. In this lawsuit?

4 Q. Uh-huh.

5 A. My job's to speak for my fellow
6 classmates.

7 Q. And what -- what are you seeking to
8 get for them?

9 A. Compensation.

10 Q. Okay.

11 A. For damages and loss. For their
12 damages.

13 Q. Okay. And you'll agree with me that
14 every student is impacted in a different way by
15 an event like this?

16 A. Yes.

17 Q. Some may not be affected at all?

18 A. That's an opinion.

19 Q. Okay. But you don't know?

20 A. No.

21 Q. Do you understand that you have to put
22 the interests of the other people who have
23 attended Bishop England over the years, their
24 interests have to go in front of your own; do you
25 understand that?

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1 A. My interests goes hand in hand with
2 theirs.

3 Q. Well, you couldn't settle this case
4 without letting everybody in the class know?

5 A. Yes, but they also couldn't settle the
6 case if no one stepped up.

7 Q. What's your involvement in preparing
8 the complaint?

9 A. I've spoken with my lawyers, I've met
10 with them.

11 Q. And I don't want to know anything
12 about what happened in those meetings.

13 A. Uh-huh.

14 Q. I'm not entitled to know that. Did
15 you review the complaints before they got filed?

16 A. Yes.

17 Q. Did you make any --

18 A. For the most part.

19 Q. Did you make any notes and I'm not
20 asking whether you communicated with your
21 lawyers?

22 A. Uh-huh.

23 Q. Did you make any -- think of anything
24 that needed to be corrected?

25 A. No, I did not.

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1 Q. So as I understand it, The Richter
2 Firm reached out to your mother to see if she had
3 any children who would be interested in filing
4 the lawsuit?

5 MR. SOLOMON: Object to the
6 form.

7 BY MR. DUKES:

8 Q. Right?

9 A. Yes.

10 Q. And your mother put The Richter Firm
11 in touch with you, correct?

12 A. Yes. She asked me if I was willing.

13 Q. What else did you and your mother talk
14 about in connection with filing this lawsuit?

15 A. She explains the case -- she explained
16 what -- about the Jeff Scofield incident, which
17 we talked about again, and then she told me if
18 I'm willing -- if I'm willing to go on and talk
19 about it or join the case and part of this class,
20 of the students.

21 Q. Do you know whether The Richter Firm
22 reached out to any other students, former
23 students?

24 A. They have told me that they have.

25 Q. Other than today, when was the first

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1 time that you met Carl Solomon, the lawyer
2 sitting next to you?

3 A. About a week ago.

4 Q. What about Dan Slotchiver?

5 A. A week ago.

6 Q. Mr. Halversen here?

7 A. A week ago.

8 Q. Prior to the lawsuit, had you met any
9 of them?

10 A. Sorry. I met him about like a few
11 months ago. Sorry, my bad.

12 Q. Prior to filing the lawsuit, had you
13 met with Mr. Solomon or Mr. Slotchiver or
14 Mr. Halversen?

15 A. No, I had not.

16 Q. Do you know of any other -- well, you
17 never complained about the presence of windows in
18 the locker room to someone at Bishop England,
19 right?

20 A. No. I knew they were there, but I
21 never connected the dots that someone would be
22 videotaping me as the blinds were closed or the
23 possibility that someone would be videotaping me.

24 Q. Do you know anybody who got
25 photographed covertly in the locker rooms?

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1 A. No, that's not public knowledge, to my
2 knowledge.

3 Q. So you're suing because of something
4 that might have happened, but you don't know
5 whether it did or not?

6 A. I think that's worse than knowing.

7 Q. What did you do to prepare for this
8 deposition?

9 A. I met with my lawyers.

10 Q. Do you know of any parents who were
11 aware of the windows in the locker room?

12 A. No.

13 Q. What about other students?

14 A. The students that were there, that
15 were part of the school that change in front of
16 the -- that changed in P.E., I'm sure they know
17 about the windows being there.

18 Q. Because they were obvious, right?

19 A. Yeah. Yes, sir.

20 Q. You couldn't miss them?

21 A. Huh-uh. No, sir.

22 Q. And at least you knew that the
23 coaches' offices were on the other side of that
24 window, right?

25 A. As well as my fellow classmates.

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1 Q. Okay. While you were at Bishop
2 England, are you satisfied with the education you
3 received?

4 A. Yes.

5 Q. And you took classes in regular
6 classrooms which seems like an alien concept
7 today. Teachers were there?

8 A. Yes.

9 Q. Lights were on, computers worked?

10 A. Yes.

11 Q. Do you know any of -- any students or
12 parents who didn't pay tuition?

13 A. Yes.

14 Q. Okay. Who didn't?

15 A. If you had -- if you -- I think there
16 was scarce scholarships. I didn't know many
17 people who were on academic scholarships as well
18 as if you were a student of a teacher there.

19 Q. Okay. Do you know of any -- any
20 students who didn't play athletics?

21 A. Yes.

22 Q. And how many people didn't play
23 athletics, because I know that Bishop England has
24 a very high percentage?

25 A. Yes, sir.

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1 MR. RICHTER: Has a high what?

2 BY MR. DUKES:

3 Q. Percentage of students who
4 participated in athletics.

5 A. I would say -- like you said, I think
6 a majority, but I can't tell you a percentage or
7 a number off the top of my head of how many did
8 not.

9 Q. How many people came into Bishop
10 England for the first time as a junior?

11 A. Was not often. Not that often. Not
12 that many. Was not many.

13 Q. Okay. And over the years, there are
14 people who never did physical education class,
15 right?

16 A. It was mandatory.

17 Q. But if you came in as a junior, you
18 missed it?

19 A. You had to have done it elsewhere, but
20 you could not graduate without doing physical
21 education.

22 Q. Right.

23 A. So you either did it at a different
24 school or you had to have done it -- there were
25 juniors who did the physical education if they

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1 did not do it elsewhere.

2 Q. Okay. Do you know of anybody who did
3 not change clothes in the locker room?

4 A. No, I do not.

5 Q. Are you aware of anybody who opted to
6 change clothes in one of the school bathrooms?

7 A. I do not know of anyone.

8 Q. And not every one of these students
9 who changed clothes in the locker room got
10 photographed by someone, right?

11 A. Sorry, can you repeat your question?

12 Q. Yeah. Not every student who changed
13 clothes in the locker rooms got photographed?

14 A. I can't speak to that. I don't know
15 if I got videotaped or photographed and I can't
16 tell you if somebody else did or not.

17 Q. But nobody has told you you were
18 photographed, right?

19 A. No, I was told --

20 Q. Law enforcement hadn't told you?

21 A. No, but that doesn't mean it's not on
22 the dark web, as I said before, or if someone
23 else contains that information that they have not
24 publicly shared and keeping it for themselves.

25 Q. So what do you want out of this

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1 lawsuit, money?

2 A. I would leave that up to a jury to
3 decide. That's not for me to decide, but I think
4 that would be -- that would help.

5 Q. Okay. What else?

6 A. An apology would help, as well. But
7 again, that's for a jury to decide.

8 MR. DUKES: All righty, Tomas, I
9 think that's all I have for you.

10 THE DEPONENT: Awesome.

11 MR. DUKES: Mr. Solomon might
12 have a question or two.

13 (Whereupon, there was a short
14 break in the proceedings.)

15 MR. SOLOMON: No questions.

16 MR. DUKES: Okay, we're done.

17 (This deposition concluded at 2:38 p.m.)

18

19 (Signature reserved.)

20

21

22

23

24

25

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1 C E R T I F I C A T E

2

3 STATE OF SOUTH CAROLINA)

4 COUNTY OF BERKELEY)

5

6 I, Nicole D. White, Certified Court
7 Reporter and Notary Public, State of South
8 Carolina at Large, certify that I was authorized
9 to and did stenographically report the foregoing
10 deposition of Male Student; and that the
11 transcript is a true record of the testimony given
12 by the witness, and was sworn as such.

13 I further certify that I am not a
14 relative, employee, attorney or counsel of any of
15 the parties, nor am I a relative or employee of
16 any of the parties' attorney or counsel connected
17 with the action, nor am I financially interested
18 in the action.

19 WITNESS MY HAND AND OFFICIAL SEAL this
20 13th day of October 2021.

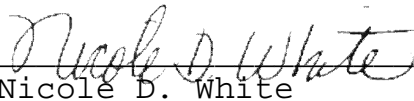
21

22

23

24

25 My Commission expires September 8, 2027



Nicole D. White
Notary Public in and for the
State of South Carolina



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1 E R R A T A S H E E T

2

RE: Nestler, et al -vs- The Bishop of Charleston,
3 et al

4 DEPOSITION OF: Male Student

5 Please read this original deposition with
6 care, and if you find any corrections or changes
7 you wish made, list them by page and line number
8 below. DO NOT WRITE IN THE DEPOSITION ITSELF.

9 Return the deposition to this office after it is
10 signed. We would appreciate your prompt attention
11 to this matter.

12 To assist you in making any such
13 corrections, please use the form below. If
14 supplemental or additional pages are necessary,
15 please furnish same and attach them to this errata
16 sheet.

17 Page _____ Line _____ Should read:_____

18 _____

19 Reason for change: _____

20 Page _____ Line _____ Should read:_____

21 _____

22 Reason for change: _____

23 Page _____ Line _____ Should read:_____

24 _____

25 Reason for change: _____

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1 Page _____ Line _____ Should read: _____

2 _____

3 Reason for change: _____

4 Page _____ Line _____ Should read: _____

5 _____

6 Reason for change: _____

7 Page _____ Line _____ Should read: _____

8 _____

9 Reason for change: _____

10 Page _____ Line _____ Should read: _____

11 _____

12 Reason for change: _____

13

14

15

Signature

16

17 SUBSCRIBED and SWORN TO before me this

18 _____ day of _____ 2021.

19

20

21

NOTARY PUBLIC

22

23 My Commission expires: _____

24

25

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2:21-cv-00613-RMG Date Filed 12/13/21 Entry Number 67-19 Page 1 of 30

EXHIBIT 18

=====

Deposition of:

Female Student

=====

Gary Nestler, et al
v.
The Bishop of Charleston, a Corporation Sole, Bishop
England High School, et al

Case #: 2:21-cv-00613-RMG

October 4, 2021

=====



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JA1175

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Page 1

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Gary Nestler, Viewed CASE NO. 2:21-cv-00613-RMG
Student Female 200,
Viewed Student Male
300, on behalf of
themselves and all
others similarly
situated,

Plaintiff(s),

-vs-

The Bishop of Charleston,
a Corporation Sole,
Bishop England High School,
Tortfeasors 1-10, The Bishop
of the Diocese of Charleston,
in his official capacity, and
Robert Guglielmone, individually,

Defendant(s).

DEPOSITION

VIA ZOOM OF: FEMALE STUDENT

DATE TAKEN: MONDAY, OCTOBER 4, 2021

TIME: 12:04 P.M.

PLACE: TURNER PADGET GRAHAM LANEY, PA
40 Calhoun Street, Ste. 200
Charleston, SC 29401

REPORTED BY: Nicole D. White
Certified Court Reporter
Notary Public

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1 A P P E A R A N C E S

2

REPRESENTING THE PLAINTIFF:

3 (Via Zoom)

By: CARL L. SOLOMON, ESQUIRE

4 Solomon Law Group, LLC

P.O. Box 1806

5 Columbia, SC 29202

(803) 391-3120

6 Carl@solomonlawsc.com

and

7 (Via Zoom)

By: BRENT HALVERSEN, ESQUIRE

8 Halversen & Halversen

751 Johnnie Dodds Blvd., Ste. 200

9 Mount Pleasant, SC 29464

(843) 284-5790

10 Brent@Halversenlaw.com

and

11 (Via Zoom)

BY: ANNA RICHTER, ESQUIRE

12 The Richter Firm, LLC

622 Johnnie Dodds Blvd.

13 Mount Pleasant, SC 29464

(843) 849-6000

14 ARichter@richterfirm.com

15

REPRESENTING THE DEFENDANT:

16 By: RICHARD S. DUKES, JR., ESQUIRE

Turner Padget Graham & Laney, P.A.

17 40 Calhoun Street, Suite 200

Charleston, SC 29401

18 (843) 576-2810

Rdukes@turnerpadget.com

19

20 Also Present:

(Via Zoom)

21 Male Student

22

23

24

25

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I N D E X

EXAMINATION

PG

By Mr. Dukes.....04

By Mr. Solomon.....49

Certificate of Reporter.....51

Errata Sheet.....52

E X H I B I T S

(No exhibits were offered or marked.)

STIPULATIONS

It is hereby stipulated and agreed by and
between the parties hereto, through their
respective counsel, that the reading and signing
of the transcript is reserved by the Deponent.

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Page 4

1 (Whereupon, all counsel
2 stipulated to the swearing of the witness
3 remotely.)

4 (FEMALE STUDENT, having been
5 first duly sworn, testified as follows:)

6 E-X-A-M-I-N-A-T-I-O-N

7 BY MR. DUKES:

8 Q. Good morning, Ms. Cox, my name is
9 Richard Dukes and I represent the defendants in
10 this -- the case that you brought against the
11 Diocese of Charleston and Bishop England High
12 School.

13 Before we begin, there are a few rules
14 that we have to go over that are a little bit
15 different since we're on Zoom. But one thing is
16 you're not allowed to communicate with your
17 lawyers or with anybody else during the course of
18 your deposition. No texting, no instant
19 messaging or WhatsApping with anybody. I realize
20 we're talking to you from Spain. So you're not
21 gonna be stepping out of the room to talk to your
22 lawyers or anything.

23 Now that we've commenced your
24 deposition, off-the-record conversations between
25 you and anybody are privileged and I can ask you

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Female Student - 10/4/2021

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1 about them, okay?

2 A. Right. Yes.

3 Q. If you don't understand one of my
4 questions and I know we might have
5 telecommunication problems, hopefully not, but it
6 may happen. Let me know, please, and I'll
7 clarify or restate the question.

8 A. Yes, sir.

9 Q. Our court reporter is taking down
10 everything we say and it will be helpful if you
11 would let me finish my question before you start
12 to answer and I'll let you finish your answer
13 before I ask you another question.

14 A. Okay.

15 Q. And finally, again, because our court
16 reporter is taking everything down, please try to
17 avoid answering with a nod of the head or saying,
18 "uh-huh" or "huh-uh".

19 A. Right.

20 Q. That makes it difficult for her. So I
21 mentioned that we're talking to you from Spain.
22 Where in Spain are you living?

23 A. I live in Pamplona, Spain. It's in
24 the northern part.

25 Q. And are you studying there or in

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1 college?

2 A. Yes, sir. I'm in my second year of
3 college.

4 Q. Where do you attend college?

5 A. University of Navarra.

6 Q. Just as a matter of interest, how are
7 the COVID precautions in Spain right now?

8 A. They're great. A lot of things have
9 been uplifted.

10 Q. Okay. What is your major?

11 A. International relations.

12 Q. And do you plan to spend all -- your
13 whole college at the University of Navarra?

14 A. Yes.

15 Q. When did you attend Bishop England?

16 A. 2016, my freshman year through 2019,
17 my junior year.

18 Q. And where did you go for your senior
19 year?

20 A. I left and I went to Argentina to
21 study.

22 Q. Argentina's where your mother's from?

23 A. Yes, sir.

24 Q. While you were at Bishop England, did
25 you take physical education classes?

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Female Student - 10/4/2021

Page 7

1 A. Yes.

2 Q. Did you play sports?

3 A. Yes.

4 Q. What sports did you play?

5 A. Cheerleading, soccer, and tennis.

6 Q. And when did you take P.E.?

7 A. My sophomore year.

8 Q. Did you ever encounter a man named
9 Jeffrey Scofield?

10 A. Yes.

11 Q. Tell me about that, please.

12 A. He would come into the classrooms to
13 fix the computers or the smart boards and I also
14 saw him throughout the hallways and in the
15 office.

16 Q. In the school's main office?

17 A. Yes.

18 Q. I'm gonna ask you now a series of
19 questions about the locker rooms at Bishop
20 England. You changed clothes in the locker room?

21 A. Yes.

22 Q. How often did that happen?

23 A. More times than I can count.

24 Q. Was there ever a time when you were
25 alone in the locker room when you were changing

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Female Student - 10/4/2021

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1 clothes?

2 A. Yes.

3 Q. How often did you -- how often did
4 that happen?

5 A. More times than I can count.

6 Q. How about how many times were you in
7 the locker room changing clothes with other
8 people present?

9 A. More times than I can count.

10 Q. And these were presumably only
11 students and only females, right?

12 A. Yes.

13 Q. How many people -- when others were in
14 the locker room with you while you changed
15 clothes, how many people would there normally be?

16 A. The amount that would be, I would say
17 20, over 20.

18 Q. Was anybody standing next to you while
19 you changed clothes, using the next locker?

20 A. Yes.

21 Q. And how often?

22 A. More times than I can count.

23 Q. At the time -- when you were in the
24 locker room, did you have a cell phone in your --

25 A. Yes.

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1 Q. Did it -- did almost everybody else,
2 to your knowledge, have cell phones in their
3 backpack or in their book bag?

4 A. Yes.

5 Q. Did you see the window into the girls'
6 locker room at any time when you were in there?

7 A. Yes.

8 Q. It wasn't a two-way mirror or
9 something? I mean, you saw it was there, right?

10 A. Yes.

11 Q. Could you see inside the coaches'
12 office on the other side of the window?

13 A. I don't remember.

14 Q. Were there blinds on the window?

15 A. Yes.

16 Q. Were they open or closed?

17 A. Closed.

18 Q. Did you ever see the blinds open?

19 A. I don't remember.

20 Q. Did you ever see anybody in the
21 coaches' office from the locker room?

22 A. Yes.

23 Q. When was that?

24 A. I'm sorry, could you repeat the
25 question?

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1 Q. Sure. Did you ever, when you were
2 standing in the locker room, do you remember ever
3 seeing someone in the coaches' office?

4 A. From the locker room?

5 Q. Yes.

6 A. Not that I remember.

7 Q. Did you ever go into the coaches'
8 office for a meeting?

9 A. Yes.

10 Q. And how often did you go into that
11 coaches' office on the girls' side?

12 A. I don't remember.

13 Q. Was it more than five?

14 A. Yes.

15 Q. Who would you meet with in the
16 coaches' office?

17 A. Coach Swanson.

18 Q. And what did Coach Swanson coach, what
19 sports?

20 A. Volleyball, female P.E. class, and
21 that's all that I know that she coached.

22 Q. And what did you meet with her about?

23 A. We would talk and she would help me
24 and about gym.

25 Q. What did you need help with?

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1 A. If I had a headache, she would give me
2 essential oils or we were -- we had a good
3 relationship, so we would just talk.

4 Q. Did you ever complain to anybody that
5 there was a window looking into the room?

6 A. Could you specify that "anybody"?

7 Q. To Principal Finneran, to Assistant
8 Principal Tucker, to anyone at Bishop England?

9 A. No.

10 Q. Did you tell your mother about the
11 window in the locker room?

12 A. No.

13 Q. And your mother taught Spanish at
14 Bishop England, correct?

15 A. Yes.

16 Q. Did you ever complain to anyone at
17 Bishop England that there were other people in
18 the locker room while you were changing clothes?

19 A. No.

20 Q. Did it seem perfectly ordinary for
21 there to be other people in the locker room with
22 you while you were changing clothes?

23 A. Yes.

24 Q. I presume that you never complained
25 that there was somebody lurking in the coaches'

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1 office while you were changing clothes since you
2 never saw anybody; is that right?

3 A. Yes.

4 Q. And you never observed anybody looking
5 through the window while you were changing
6 clothes, correct?

7 A. No.

8 Q. You did not see anybody?

9 A. No.

10 Q. Given that you were in the locker room
11 changing clothes with a bunch of other teenagers,
12 as we sit here today, are you concerned that
13 anybody else, any other students may have taken
14 pictures while you were changing clothes?

15 A. It's a possibility.

16 Q. I know, but are you concerned about
17 that?

18 A. No.

19 Q. Why not?

20 A. They were all my age, teenage
21 adolescent girls at the time.

22 Q. Are you worried that one of those
23 fellow students might post something on social
24 media about you?

25 A. Yes.

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1 Q. Why does that concern you?

2 A. I would not like pictures of me that I
3 did not know were taken to be posted on social
4 media.

5 Q. Okay. Are you aware of anybody ever
6 having taken pictures of you and put them on
7 social media, in the locker rooms?

8 A. No.

9 Q. Did you ever see anybody pull their
10 cell phone out and take a picture in the locker
11 room?

12 A. No.

13 Q. Did anybody pull their phone out and
14 make a phone call that you saw?

15 A. No.

16 Q. Have you ever made a phone call from
17 the locker room?

18 A. No.

19 Q. Was the first time you expressed
20 having some anxiety about there being a window in
21 the locker room when you saw the psychiatrist
22 retained by your lawyer?

23 A. I'm sorry, could you repeat the
24 question?

25 Q. Yeah. When was the first time you

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1 told somebody you had some concern or anxiety
2 about there being a window in the locker room?

3 A. I do not recall specifically going to
4 a therapist about the window in the locker room.

5 Q. Okay. Did you tell anybody else you
6 were concerned about there being a window in the
7 locker room?

8 A. I'm pretty sure you already asked me
9 that and I responded to no, I did not consult any
10 administrator in the school about the window.

11 Q. Okay. Since 2019, during your senior
12 year in Argentina or after, have you told anybody
13 that you were concerned about there being a
14 window in the locker room, anybody at all?

15 A. Concerning the administration of
16 Bishop England?

17 Q. Well, the fact that there was a window
18 in the locker room, yeah.

19 A. I have told friends and family members
20 about the incident of Jeffrey Scofield.

21 Q. Okay. Did you ever see Jeffrey
22 Scofield on the girls' side of the gym?

23 A. I saw Jeffrey Scofield in the gym.

24 Q. In the gym?

25 A. (Indicating).

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1 Q. But not back in the locker rooms,
2 right?

3 A. Are you asking inside the locker room?

4 Q. Or in the hallway outside on the
5 girls' side of the locker rooms?

6 A. I do not remember.

7 Q. Do you know what Jeffrey Scofield did
8 in his employment?

9 A. His specific job?

10 Q. Yes.

11 A. No.

12 Q. But you do know that he worked for the
13 athletic department, right?

14 A. From my recollection, I mostly
15 remember him being an IT guy.

16 Q. When did you first learn about
17 Mr. Scofield taking pictures on the boys' side of
18 the locker room?

19 A. About May of 2019.

20 Q. And how did you learn about it?

21 A. I'm sorry?

22 Q. How did you learn about it?

23 A. It was a huge ordeal going throughout
24 the school. I learned about it through friends.

25 Q. Which friends?

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1 A. I'm not sure who specifically.

2 Q. And what did your friends tell you?

3 A. That a girl in the grade above me had
4 found pictures taken on the iPad, the school iPad
5 that Jeffrey Scofield had owned and he took
6 pictures.

7 Q. Okay. Do you know whether he took
8 pictures of any girls?

9 A. I'm not sure.

10 Q. Has anyone alerted you that somebody
11 had taken pictures of you?

12 A. As of this moment, no.

13 Q. Do you know what happened to the iPad
14 and to Scofield's phone and computer?

15 A. No.

16 Q. Would it give you any comfort to know
17 that the South Carolina Attorney General's Office
18 has sequestered all those devices?

19 A. It doesn't comfort me. He still took
20 them and he had them.

21 Q. Right. But he doesn't have them
22 anymore and he doesn't have access --

23 A. He shouldn't have had them -- I'm
24 sorry.

25 Q. And he doesn't have access to them

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1 anymore?

2 A. He should not have had them in the
3 first place.

4 Q. True, but there's no danger that
5 anything Jeffrey Scofield took a picture of would
6 wind up in the public.

7 MR. SOLOMON: Object to the
8 form.

9 BY MR. DUKES:

10 Q. You can answer.

11 A. To my concern, he should not have had
12 them in the first place. That should not have
13 been an accessible thing to have in the first
14 place.

15 Q. And he got fired immediately and he
16 got arrested?

17 MR. SOLOMON: Same objection.

18 Rich, I'm not sure that was a question.

19 BY MR. DUKES:

20 Q. You're aware that as soon as the fact
21 that he had taken pictures of boys in the locker
22 room became known, Scofield was fired and handed
23 over to the police, right?

24 A. I'm not sure. I was not following the
25 case completely in that moment of 2019.

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1 Q. Okay. But you know he got arrested,
2 right?

3 A. Yes.

4 Q. And you know he got fired, right?

5 A. Yes.

6 Q. When did you decide to file this
7 lawsuit?

8 A. I specifically did not file the
9 lawsuit.

10 Q. But you're a plaintiff. Your name is
11 on the caption. They're suing on behalf of
12 yourself and on behalf of all other females.

13 A. About January of 2020.

14 Q. Okay. And what led up to your
15 deciding to file this lawsuit?

16 MR. SOLOMON: Rich, I'm going to
17 obviously let her start answering, but to
18 the extent it calls for any attorney/client
19 privilege, I will stop things at that point.

20 BY MR. DUKES:

21 Q. Okay. And I'm not asking for anything
22 you talked to your lawyers about, just why did
23 you decide to file this lawsuit?

24 A. To stand up and give a voice for those
25 who were wrongfully abused in the locker rooms.

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1 Q. But you're not aware of any female who
2 was photographed by anybody, right?

3 A. As of this moment in time, no.

4 Q. Well, do you think that somebody took
5 pictures of girls in the locker room?

6 A. It could be a possibility.

7 Q. Okay. But it could also be a
8 possibility that somebody falls down the stairs
9 at Bishop England. Are you standing up for all
10 the people who might fall down the stairs, as
11 well?

12 A. I think that's a wrong example to use.
13 Falling down the stairs in comparison to underage
14 boys getting pictures taken of.

15 Q. Well, you realize you're not suing on
16 behalf of underage boys, right?

17 A. Yes.

18 Q. So who is it that you're suing on
19 behalf of?

20 A. On behalf of my student body, to stand
21 up for a wrong situation that was committed in
22 the school of Bishop England.

23 Q. And the wrong situation is Jeffrey
24 Scofield taking pictures?

25 A. Yes.

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1 Q. Would you agree with me that anybody
2 who was not photographed while in the locker
3 rooms, would not have any cause of action to
4 bring, right?

5 MR. SOLOMON: Object to the
6 form.

7 BY MR. DUKES:

8 Q. You can answer.

9 A. No.

10 Q. Why? Why do you think that?

11 A. It could have been anyone.

12 Q. Okay. But it wasn't.

13 MR. SOLOMON: Object to the
14 form.

15 THE DEPONENT: It still could
16 have been. Just because it wasn't, doesn't
17 mean it couldn't have been anyone that was
18 in those locker rooms.

19 BY MR. DUKES:

20 Q. Right about that time, your mother got
21 terminated at Bishop England, didn't she?

22 A. Yes.

23 Q. Do you know what happened with that?

24 A. No.

25 Q. Do you know why she was terminated?

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1 A. Yes.

2 Q. Why was that?

3 A. Because she reposted a video on
4 Facebook about abortion.

5 Q. Do you know that she filed a lawsuit
6 against Bishop England?

7 A. Yes.

8 Q. Do you know what the result of that
9 was?

10 A. Yes.

11 Q. And what was the result?

12 A. Bishop England won in their case.

13 Q. Did your mother's treatment at Bishop
14 England factor into your decision to file this
15 lawsuit at all?

16 A. No.

17 Q. Did you discuss filing this lawsuit
18 with your mother?

19 A. Yes.

20 Q. And tell me about your conversations
21 with her.

22 A. It wasn't a conversation, mostly. It
23 was just I'm going to do this and it was a
24 statement. I'm going to do this and that's all.

25 Q. Okay. Other than your lawyers, who

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1 did you consult with about filing a lawsuit?

2 A. My brother, Tomas.

3 Q. So you're telling me that the two of
4 you cooked up this idea to file a lawsuit?

5 A. No.

6 MR. SOLOMON: Object to the
7 form.

8 BY MR. DUKES:

9 Q. Well, how did y'all decide to file the
10 lawsuit you filed?

11 A. I individually decided, as well as my
12 brother who individually decided, and we had a
13 discussion about it and that's all.

14 Q. Did you sign a contingency fee
15 agreement with these lawyers?

16 A. I'm not sure what that is.

17 Q. Did you sign an agreement hiring these
18 lawyers to represent you?

19 A. I'm not sure.

20 Q. Have you signed any piece of paper
21 with -- in this lawsuit having to do with this
22 lawsuit?

23 A. I believe so.

24 Q. Who did -- with whom did you sign that
25 agreement, which lawyer?

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1 A. The Richter Firm.

2 Q. How did you find the Richter Firm?

3 A. The Richter Firm found me.

4 Q. Okay. How did they find you?

5 A. They got in touch with my parents, who
6 gave them my phone number and e-mail, and they
7 got in touch with me asking if I would like to be
8 a part of this case, and I agreed.

9 Q. And when did they get in touch with
10 you about that?

11 A. About January of 2020.

12 Q. Prior to January of 2020, had you had
13 any contact with the Richter Firm?

14 A. No.

15 Q. What about, have you had any
16 contact -- prior to filing this lawsuit, had you
17 had any contact with a lawyer named Dan
18 Slotchiver?

19 A. No.

20 Q. What about Mr. Solomon whose smiling
21 face is on the screen?

22 A. No.

23 Q. What about Brent Halversen?

24 A. No.

25 Q. Do you know who Mr. Slotchiver,

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1 Mr. Solomon, and Mr. Halversen are?

2 A. No.

3 Q. What is it that you want to accomplish
4 with this lawsuit?

5 A. I want all corresponding factors to be
6 held accountable for what happened in May of
7 2019.

8 Q. Okay. So what -- you want other
9 people to be held accountable for what Jeffrey
10 Scofield may have done or did?

11 A. No, I want to represent my student
12 body council and me, as well, in making sure that
13 what happened never happens again.

14 Q. Well, it can't happen again, can it?
15 The windows are -- the windows are no longer in
16 the locker room.

17 A. I don't know that.

18 Q. Since leaving Bishop England, have you
19 been on the campus at all?

20 A. No.

21 Q. Did you do any investigation on your
22 own to determine whether to file this lawsuit?

23 A. No.

24 Q. Have you ever talked to any parents of
25 Bishop England students about the locker rooms?

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1 A. I don't remember.

2 Q. Did you ever send a letter or an
3 e-mail or a text message to a B.E. -- Bishop
4 England parent about the conditions in the locker
5 room?

6 A. No.

7 Q. Did you ever complain to Bishop
8 England about the locker rooms?

9 A. No.

10 Q. Have you ever posted on social media
11 about Bishop England and the locker rooms?

12 A. No.

13 Q. Why do you believe you were -- you're
14 entitled to any money?

15 A. I don't.

16 Q. Why not?

17 A. I'm not sure if I'm entitled to any
18 money. That's not why I'm here.

19 Q. Okay. What -- explain to me again
20 exactly why you are here.

21 A. I'm here to stand up for my student
22 body council and raise a voice for those who are
23 not brave enough to do it and to put down my foot
24 and make sure this never happens again.

25 Q. Okay. That's all? That's the only

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1 reason you're involved in this lawsuit?

2 A. Yes.

3 Q. Who do you want -- specifically, who
4 do you want held accountable?

5 A. Jeffrey Scofield and Bishop England as
6 a whole.

7 Q. Why do you think Bishop England as a
8 whole should be held accountable to you, who left
9 after your junior year?

10 A. I don't think the windows should have
11 been there in the first place.

12 Q. Do you know who designed it?

13 A. No.

14 Q. Do you know that Bishop England hired
15 architects to design the building as it was
16 built?

17 A. I knew about architects.

18 Q. Okay. What architects do you know
19 about?

20 A. I don't know any specific architects,
21 but isn't every building built by an architect?

22 Q. Yeah. Most of them, the ones that are
23 built well are.

24 How have you been harmed personally?

25 A. Harmed personally? Can you specify

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1 the question?

2 Q. How has Sophia Cox been injured?

3 A. Physically, emotionally?

4 Q. Yes, physically, emotionally.

5 A. In my years at Bishop England?

6 Q. By Jeffrey Scofield taking pictures of
7 boys in the locker room, how have you been
8 harmed?

9 MR. SOLOMON: Object to the
10 form.

11 THE DEPONENT: It makes me
12 anxious and it makes me mistrust a lot more
13 things. I'm not as naive as I used to be.
14 I think mentally, it's harmed me.

15 BY MR. DUKES:

16 Q. And how has the fact that there were
17 windows from the coaches' office into the locker
18 room, whether they were used as a window or not,
19 harmed you?

20 A. It makes me feel not as comfortable to
21 be as open and naive as I once was.

22 Q. Isn't that also the process of growing
23 up?

24 A. I think there's other ways to grow up
25 than to be put in that position.

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1 Q. Would you agree with me that other
2 students have reacted to the presence of windows
3 in the locker room differently than you?

4 A. As human beings, I think everyone
5 reacts differently to different situations.

6 Q. And no one student would react the
7 same way, right?

8 A. I'm not sure. You would have to ask
9 other students that.

10 Q. Okay. Would it surprise you if some
11 students don't -- are not impacted at all by the
12 fact that there were windows in the locker room?

13 A. Yes.

14 Q. Why would that surprise you?

15 A. Because those windows were taken
16 advantage of when photos of students were
17 released.

18 Q. I don't believe the pictures were ever
19 released, Ms. Cox.

20 MR. SOLOMON: Object to form.

21 THE DEPONENT: Well, the
22 information that the pictures were taken in
23 the first place, photos were released.

24 BY MR. DUKES:

25 Q. But in order to determine whether any

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1 student -- any student other than you is anxious
2 or upset because they're not as naive as they
3 once were, you'd have to ask them; is that
4 correct?

5 MR. SOLOMON: Object to the
6 form.

7 THE DEPONENT: I guess you would
8 have to ask each individual student how they
9 feel.

10 BY MR. DUKES:

11 Q. And what about the people who attended
12 Bishop England before Jeffrey Scofield ever set
13 foot on the campus?

14 A. What about them?

15 Q. Do you think they -- you'd have to ask
16 each one of them whether they have been harmed in
17 some way?

18 A. I'm not sure how long Jeffrey Scofield
19 was working at the school, so I'm not sure. I
20 guess -- I guess you would have to ask them how
21 they were affected.

22 Q. I believe he started in 2014. I think
23 I'm correct on that.

24 A. 2016 was my freshman year.

25 Q. Okay. But you'll agree with me, to

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1 find out if anybody who attended Bishop England
2 prior to 2014 is concerned about the fact that
3 there used to be windows in the locker rooms,
4 you'd have to ask them, right?

5 A. I'm sorry, could you repeat the
6 question?

7 Q. Sure. In order to find out if anybody
8 who attended school at Bishop England prior to
9 2014 when Jeffrey Scofield started work, to find
10 out whether those alumni are somehow anxious or
11 upset about the existence of windows in the
12 locker room, you'd have to ask every one of them,
13 wouldn't you?

14 A. If you want their honest opinion, yes.

15 Q. And not everybody who over the 30 --
16 nearly 30 years that Bishop England's been on
17 Daniel Island, not everybody's affected the same
18 way by the fact that there are windows in the
19 locker rooms, right?

20 A. I think everyone's entitled to their
21 own emotions, but when a huge event happens, it
22 can impact each person, and as a whole, it has
23 impacted all of them.

24 Q. How has it impacted all of them?

25 A. Because you trust that you're in your

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1 school and that you're in a safe environment to
2 keep you safe and then out of nowhere, you
3 receive this information that completely tears
4 down all of that trust and innocence and safety
5 you thought you once had.

6 Q. Do you know why those windows were put
7 in the locker rooms by the architect?

8 A. No.

9 Q. Do you know that they were put into
10 the locker rooms as a safety feature?

11 A. I suppose so.

12 Q. I want to turn now, Sophia, to
13 Dr. Solis, the psychiatrist. Did you meet with
14 her in person or by Zoom?

15 A. By Zoom.

16 Q. And when did you meet with Dr. Solis?

17 A. I'm not sure the specific date.

18 Q. Did you see Dr. Solis on your own or
19 were you put in touch with her by your lawyers?

20 A. I was put in touch with her by my
21 lawyers, but we had a meeting alone.

22 Q. Okay. But you didn't seek out
23 psychiatric or psychological treatment on your
24 own, did you?

25 A. I did.

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1 Q. Who did you see?

2 A. I have an individual therapist.

3 Q. Who was that?

4 A. Emily Evans.

5 Q. Is Emily Evans in Charleston?

6 A. Yes.

7 Q. Do you know where she practices?

8 A. On Daniel Island.

9 Q. Do you know the name of her practice
10 group?

11 A. I'm not sure.

12 Q. When did you first treat with Emily
13 Evans?

14 A. Freshman year.

15 Q. 2016?

16 A. Yes.

17 Q. What did you see Ms. Evans for?

18 A. For anxiety and depression.

19 Q. What was causing you -- causing you to
20 be anxious and depressed?

21 A. Mostly the workload, the pressure of
22 Bishop England, and the social hierarchy in
23 Bishop England, as well.

24 Q. Did you like going to Bishop England?

25 A. Depended on the day, but mostly no.

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1 Q. Where would you have preferred to
2 attend high school?

3 A. I guess Wando High School.

4 Q. Would it surprise you to know that
5 Wando High School also has windows from coaches'
6 offices into the locker rooms?

7 A. Yes.

8 Q. Have you ever played sports at Wando?

9 A. No.

10 Q. What about at Stall High School?

11 A. No.

12 Q. What about Burke High School?

13 A. No.

14 Q. What about North Charleston High
15 School?

16 A. No.

17 Q. Have you ever been in the locker rooms
18 at any of the high schools in Berkeley County,
19 Hanahan and Ashley Ridge?

20 A. In the locker rooms, no.

21 Q. Yes. What about Ashley Ridge or Cane
22 Bay or Stratford?

23 A. No.

24 Q. Would it trouble you to know that all
25 of those schools have windows from coaches'

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1 offices into the locker rooms?

2 A. Yes.

3 Q. How long did you treat with Emily
4 Evans?

5 A. Until I went -- I left for Argentina.

6 Q. I'm gonna stand up so our lights come
7 back on, so I'm not sitting in the dark.

8 Did you and Ms. -- did Ms. Evans help
9 with your anxiety and depression?

10 A. Yes.

11 Q. And you left -- you left Bishop
12 England to go to Argentina in 2019; is that
13 correct?

14 A. Yes.

15 Q. Did you treat with Ms. Evans after
16 Jeffrey Scofield's misdeeds were revealed?

17 A. Yes.

18 Q. Did you discuss Scofield with
19 Ms. Evans?

20 A. Yes.

21 Q. What did you talk about with Ms. Evans
22 about Jeffrey Scofield?

23 A. How horrible the incident was, how at
24 such a prestigious school like Bishop England,
25 how it's incredible that that was able to happen,

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1 and how saddening an event that was.

2 Q. And what did Ms. Evans tell you?

3 A. Just to stay calm and that I'm almost
4 done with the year and that -- and as much as I
5 know I wasn't in the pictures, as of now that I
6 know and -- yeah, just that. I was almost done
7 with the year, so it was okay.

8 Q. Okay. And that's because you weren't
9 in any of the pictures?

10 A. Not that I know of.

11 Q. And nobody's provided you with
12 information saying you were photographed by
13 someone, right?

14 A. No.

15 Q. Nobody's told you that?

16 A. No.

17 Q. And throughout -- from 2016
18 through 2019, you were aware that those windows
19 were in the locker rooms, right?

20 A. Yes.

21 Q. They were obvious, I mean, you
22 couldn't miss them, correct?

23 A. Yes. Yes.

24 Q. Did you ever refuse to change clothes
25 in the locker rooms because those windows were

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1 there?

2 A. No.

3 Q. Did you ever look through the window
4 into the coaches' office and see a window in the
5 door to the coaches' office?

6 A. From the locker room point of view, it
7 was hard to see into the office.

8 Q. Why is that?

9 A. Because it was dark inside the office.

10 Q. And the blinds were down, right?

11 A. I never tried to look.

12 Q. During the time you were at Bishop
13 England, did you walk down that hallway that is
14 outside of the coaches' office and outside of the
15 locker room?

16 A. Yes.

17 Q. Did you ever notice a sign that said
18 "Warning, you are under surveillance after this
19 point"?

20 A. No.

21 Q. Did you ever look through the window
22 into the coaches' office from the hallway?

23 A. No. They were always closed.

24 Q. The doors or the windows?

25 A. Both.

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Female Student - 10/4/2021

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1 Q. So there were blinds on the window
2 that is in the door, as well?

3 A. The door going into the office?

4 Q. Yes.

5 A. From what I remember, yes.

6 Q. And those blinds were always closed?

7 A. If the door was closed.

8 Q. When you met with your coach, was --
9 with Coach Swanson, was the door open or closed?

10 A. Open.

11 Q. And were the blinds looking into the
12 locker room open or closed?

13 A. Closed.

14 Q. Did you ever see those blinds in the
15 window in the coaches' office open?

16 A. Not from what I recall.

17 Q. You have filed an action as a
18 potential class action. Do you understand what a
19 class action is?

20 A. Somewhat.

21 Q. What do you understand?

22 A. That it's the representation of the
23 whole student council, student body.

24 Q. Every student who's ever gone to
25 Bishop England since it moved to Daniel Island in

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Female Student - 10/4/2021

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1 1998?

2 A. I'm not sure.

3 Q. Do you understand what's required of
4 you?

5 A. In what context?

6 Q. What's required of you as a
7 representative of a class?

8 A. No. I'm confused about the question.

9 Q. Okay. Do you know what your
10 responsibility is, if you are authorized to bring
11 a class -- to represent the class of students?

12 A. Yes.

13 Q. Okay. What is that responsibility?

14 A. To stand up for what's right and...
15 (Whereupon, there were technical difficulties.)

16 MR. SOLOMON: Rich, she is
17 frozen or I am.

18 MR. DUKES: I see that.

19 BY MR. DUKES:

20 Q. Sophia, can you hear us?

21 A. Yes, now I can hear you. Sorry about
22 that.

23 Q. It's okay. You froze up on us for a
24 minute.

25 A. Yeah.

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Female Student - 10/4/2021

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1 Q. Do you understand that you have to put
2 the interests of your -- the class you represent
3 and want to represent ahead of your own
4 interests?

5 A. Yes. I think I'm also part of that
6 student body council, so it is an equal interest,
7 as well.

8 Q. Do you understand that there may be
9 financial obligations placed on you?

10 MR. SOLOMON: Object to the
11 form.

12 BY MR. DUKES:

13 Q. You can answer.

14 A. I'm not sure.

15 Q. I mean, if all of your lawyers were
16 eaten by a swarm of great white shakes at the
17 beach one day, you would still have to go on with
18 this lawsuit, you couldn't just drop it; do you
19 understand that?

20 A. Yes.

21 Q. And would you be able to -- would you
22 be in a position to support that lawsuit
23 financially?

24 MR. SOLOMON: Object to the
25 form.

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Female Student - 10/4/2021

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1 THE DEPONENT: Yes.

2 BY MR. DUKES:

3 Q. You have that kind of means? You
4 could pay lawyers to represent you and the class?

5 MR. SOLOMON: Rich, paying
6 lawyers and other things, this is getting a
7 bit far afield.

8 MR. DUKES: It goes to her
9 adequacy as a class representative, Carl.

10 MR. SOLOMON: Rich, I don't know
11 the last time either of us has seen any
12 class rep. pay lawyers to represent them. I
13 think you're being a little bit disingenuous
14 with that.

15 MR. DUKES: I was asking her if
16 you and Larry and Dan and Brent got eaten by
17 a shark, if she could afford to pay a lawyer
18 to represent the class going forward after
19 that tragic event.

20 MR. SOLOMON: That implies that
21 she has to come out of pocket to pay a
22 lawyer and you're very well aware that most
23 people on contingencies and the court
24 addresses fees to their successor. Object
25 to the form of that question.

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Female Student - 10/4/2021

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1 BY MR. DUKES:

2 Q. Sophia, did you read the complaint
3 before filing?

4 A. The complaint?

5 Q. Yes.

6 A. Yes.

7 Q. Did you understand what it said?

8 A. About this lawsuit?

9 Q. Yes.

10 A. Yes.

11 Q. Okay. What did it say, in your own
12 words?

13 A. That the windows -- easy accessibility
14 to those windows should not have been made
15 available and what happened with Jeffrey Scofield
16 should not have happened.

17 Q. Did you make any comments on any
18 drafts of the complaint?

19 A. No.

20 MR. SOLOMON: To the extent
21 that you're asking about things that would
22 clearly be within attorney/client
23 privilege, if we conveyed something to her
24 and she's speaking back to us, that's
25 clearly covered.

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Female Student - 10/4/2021

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1 BY MR. DUKES:

2 Q. I'm not asking you if you told your
3 lawyers anything. Did you make any notes on the
4 complaint?

5 A. Not that I remember.

6 Q. Did you look at the complaint before
7 or after it got filed?

8 A. I don't remember.

9 Q. Do you know of any other alumni or
10 students who have gotten in touch with a lawyer?

11 A. No.

12 Q. How about any parents?

13 A. No.

14 Q. Did your mother talk to you about her
15 and your father being a plaintiff in this
16 lawsuit?

17 A. No.

18 Q. Why isn't she a party to this lawsuit?

19 A. I don't know.

20 Q. Why do you think you can fairly and
21 adequately represent the interests of thousands
22 of former students?

23 A. I think I'm going to do as best as I
24 can to represent those that aren't brave enough
25 to have their own voice.

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Female Student - 10/4/2021

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1 Q. Do you know of any parents who are
2 aware of these windows in the locker rooms?

3 A. Specifically, no.

4 Q. Did any parent coach any of your teams
5 or serve as assistant coach of any of your teams?

6 A. Yes.

7 Q. And who were those?

8 A. For the tennis team, it was Jim
9 Greenhill. For the cheerleading team, it was
10 Blair -- I don't recall her last name. She
11 worked with Ms. Condon, who was a math teacher at
12 the school.

13 Q. And did --

14 A. And -- yes.

15 Q. Did your cheerleading coach, Blair,
16 ever go into the locker room while you were
17 there?

18 A. The cheerleaders would not change in
19 the locker room.

20 Q. Okay. You would put on your uniform
21 at home?

22 A. We would change in the school
23 bathrooms.

24 Q. Why is that?

25 A. Some did not feel comfortable in the

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Female Student - 10/4/2021

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1 locker room and others was when there were other
2 teams changing in there.

3 Q. Who didn't feel comfortable changing
4 clothes in the locker rooms?

5 A. Some of the girls on the cheerleading
6 team.

7 Q. Which ones?

8 A. I don't remember specifically.

9 Q. But it was not you, right?

10 A. At that moment in time, no.

11 Q. What were the girls who were -- who
12 were -- excuse me. Were not comfortable with the
13 locker rooms? What made them uncomfortable?

14 A. The fact that there were so many
15 people changing in the locker rooms and just it
16 wasn't an attractive place to be in.

17 Q. Why was it not an attractive place to
18 be in?

19 A. It was gross. There were many people
20 in and out of there all the time.

21 Q. When you were at Bishop England, you
22 got an education, didn't you?

23 A. Yes.

24 Q. And I dare say you got a good
25 education, correct?

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Female Student - 10/4/2021

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1 A. Yes.

2 Q. And you took classes and played sports
3 on school facilities, right?

4 A. Yes.

5 Q. And you had teachers in all your
6 classes in person every day, right?

7 A. Yes.

8 Q. And there were computers and lights,
9 smart boards, supplies, all of that was provided,
10 right?

11 A. Yes.

12 Q. Do you know of any students who opted
13 out of physical education class?

14 A. To my knowledge, that was not a
15 choice.

16 Q. What about people who didn't play
17 sports at all?

18 A. What about them?

19 Q. Are you aware of anybody who didn't
20 play sports?

21 A. Yes.

22 Q. Are you aware of anybody who never
23 changed clothes in the locker room?

24 A. No.

25 Q. Are you aware of any female student

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Female Student - 10/4/2021

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1 who was photographed in the locker rooms while
2 she changed clothes?

3 A. As of this moment, I am not aware.

4 Q. What did you do to prepare for this
5 deposition?

6 A. I had a meeting with my lawyers.

7 Q. And I don't want to know what you
8 talked with your lawyers about, I'm not entitled
9 to know that, but how long did that meeting last?

10 A. About an hour and a half.

11 Q. Was that a Zoom meeting or in person?

12 A. Zoom.

13 Q. There are a couple of standard
14 questions that I have to ask you. Have you ever
15 been arrested?

16 A. No.

17 Q. Have you ever been charged with a
18 crime?

19 A. No.

20 Q. Have you taken any medications that --
21 that might affect your memory today?

22 A. No.

23 Q. Okay. Are you taking any medications
24 at all?

25 A. No.

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Female Student - 10/4/2021

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1 Q. Did your psychologist, Ms. Evans,
2 arrange for you to be prescribed any medications?

3 A. Yes.

4 Q. And what medications did you take?

5 A. It was a depression medication, but I
6 don't remember the name of it.

7 Q. Who was the prescribing physician?

8 A. Parkwood Pediatric.

9 Q. And was that on Daniel Island, as
10 well?

11 A. Yes.

12 Q. Are you still taking antidepressants?

13 A. No.

14 Q. When did you stop?

15 A. In July, I believe, of 2019.

16 Q. And why did you feel that getting off
17 the meds. was appropriate?

18 A. They weren't as -- they weren't
19 helping me.

20 Q. Do you still struggle with depression?

21 A. On and off.

22 Q. Are you seeing a psychologist now?

23 A. No.

24 Q. What about a psychiatrist, are you
25 seeing one of those?

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1 A. No.

2 MR. DUKES: Sophia, I think
3 that's all I've got for you. Your lawyers
4 may have some questions for you, but I
5 appreciate your time.

6 THE DEPONENT: All right. Thank
7 you.

8 MR. SOLOMON: All right. Since
9 we've been going about an hour or a little
10 better, can we take a two-minute break and
11 let us huddle up and get right back with
12 you?

13 MR. DUKES: Okay.

14 (Whereupon, there was a short
15 break in the proceedings.)

16 BY MR. DUKES:

17 Q. Sophia, while we were on our break,
18 did you talk to anybody?

19 A. No, there's nobody in my house.

20 Q. Did you communicate with anyone by
21 text or instant messaging or any other way?

22 A. No.

23 MR. DUKES: Okay. That's all I
24 have for you and Mr. Solomon may have a few
25 questions. I don't know.

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1 E-X-A-M-I-N-A-T-I-O-N

2 BY MR. SOLOMON:

3 Q. Sophia, Mr. Dukes asked you various
4 questions. I want to just touch on a couple, if
5 we may. One, he asked you whether or not you
6 felt like you were entitled to money. Is that
7 something you're gonna leave up to a jury and the
8 court?

9 MR. DUKES: Object to the form.

10 THE DEPONENT: No, the money
11 isn't my concern at all.

12 BY MR. SOLOMON:

13 Q. All right. Would you agree that you
14 don't have to ask every individual student to
15 determine to know that they didn't give their
16 consent to be viewed by adults?

17 A. Yes.

18 Q. And did you have any reason to suspect
19 adults were viewing you or could view you while
20 you were changing clothes?

21 A. No.

22 Q. All right. And you wouldn't have to
23 ask every student that went to Bishop England to
24 know that viewing students by adults would be
25 wrong, would you?

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1 MR. DUKES: Object to the form.

2 THE DEPONENT: No, I would not
3 have to ask every student.

4 MR. SOLOMON: Okay. No further
5 questions.

6 MR. DUKES: Nothing more from
7 me, Sophia. Thank you.

8 THE DEPONENT: Great. Thank you
9 so much.

10 MR. SOLOMON: Take care. We'll
11 read and sign.

12 MR. DUKES: Okay.

13 (This deposition concluded at 1:15 p.m.)

14

15 (Signature reserved.)

16

17

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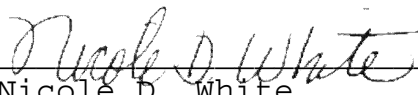
C E R T I F I C A T E

STATE OF SOUTH CAROLINA)
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I, Nicole D. White, Certified Court
Reporter and Notary Public, State of South
Carolina at Large, certify that I was authorized
to and did stenographically report the foregoing
deposition of Female Student; and that the
transcript is a true record of the testimony given
by the witness, and was sworn as such.

I further certify that I am not a
relative, employee, attorney or counsel of any of
the parties, nor am I a relative or employee of
any of the parties' attorney or counsel connected
with the action, nor am I financially interested
in the action.

WITNESS MY HAND AND OFFICIAL SEAL this
13th day of October 2021.


Nicole D. White
Notary Public in and for the
State of South Carolina



My Commission expires September 8, 2027

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1 E R R A T A S H E E T

2

RE: Nestler, et al -vs- The Bishop of Charleston,
3 et al

4 DEPOSITION OF: Female Student

5 Please read this original deposition with
6 care, and if you find any corrections or changes
7 you wish made, list them by page and line number
8 below. DO NOT WRITE IN THE DEPOSITION ITSELF.

9 Return the deposition to this office after it is
10 signed. We would appreciate your prompt attention
11 to this matter.

12 To assist you in making any such
13 corrections, please use the form below. If
14 supplemental or additional pages are necessary,
15 please furnish same and attach them to this errata
16 sheet.

17 Page _____ Line _____ Should read:_____

18 _____

19 Reason for change: _____

20 Page _____ Line _____ Should read:_____

21 _____

22 Reason for change: _____

23 Page _____ Line _____ Should read:_____

24 _____

25 Reason for change: _____

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1 Page _____ Line _____ Should read: _____

2 _____

3 Reason for change: _____

4 Page _____ Line _____ Should read: _____

5 _____

6 Reason for change: _____

7 Page _____ Line _____ Should read: _____

8 _____

9 Reason for change: _____

10 Page _____ Line _____ Should read: _____

11 _____

12 Reason for change: _____

13

14

15

Signature

16

17 SUBSCRIBED and SWORN TO before me this

18 _____ day of _____ 2021.

19

20

21

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22

23 My Commission expires: _____

24

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EXHIBIT 19

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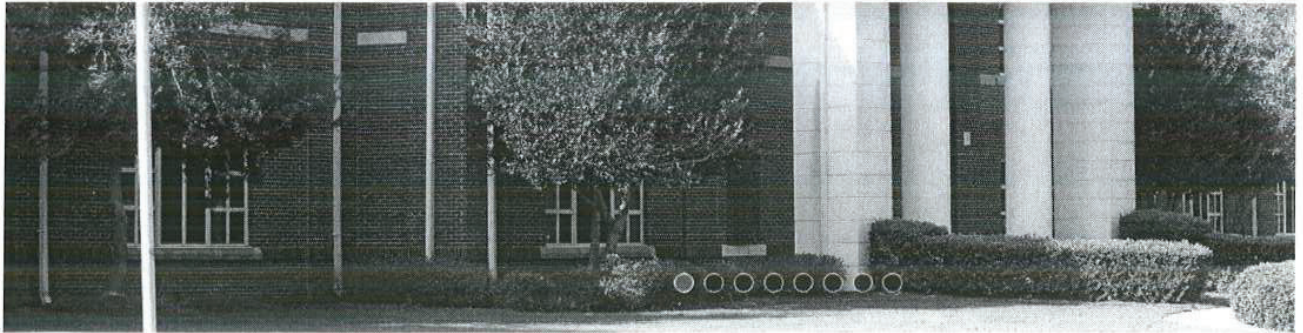
ABOUT US

Bishop England High School, established on September 22, 1915, is a member of the Catholic Diocese of Charleston, serving grades 9 through 12. We are tasked with bringing forth a more caring society and helping to form morally, intellectually, and physically sound young people in a Catholic environment.



Welcome from Principal
BE By the Numbers
Sisters of Charity of Our Lady of Mercy
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Child Protection Services

The Charter for the Protection of Children and Young People

"Let there no doubt or confusion on anyone's part: For us, your bishops, our obligation to protect children and young people and to prevent sexual abuse flows from the mission and example given to us by Jesus Christ himself, in whose name we serve."

In addressing the crisis experienced by the Church in the United States in 2002, the United States Conference of Catholic Bishops met to decide how best to deal with the scandal that had erupted in the Church with the allegations of Child Sexual Abuse.

Two crucial decisions came from the Bishops at that conference:

- They accepted their culpability in some of the past mistakes that were made.
- They wanted to assure everyone that this kind of situation would never be allowed to happen again.

And so was born the Charter for the Protection of Children and Young People. The Charter is a promise from the Catholic Bishops in America that they would do all in their power to assure parents and the community at large, that even though mistakes were made, the future of the Church in America would embrace the safety of its children as a focal point of its mission.


The Charter implements the mandates, which if followed, will protect the children in our care. The Charter contains 17 Articles, when embraced, will seriously curb the possibility of child sexual abuse happening in our parishes and schools.

With 17 Articles, the focus of the Charter is:

- To Promote Healing and Reconciliation with Victims/Survivors of Sexual Abuse of Minors
- To Guarantee an Effective Response to Allegations of Sexual Abuse of Minors
- To Ensure the Accountability of Our Procedures
- To Protect the Faithful in the future

<http://sccatholic.org/child-protection-services/charter>
<http://sccatholic.org/child-protection-services?m=h>

Files:

-  [Charter-for-the-Protection-of-Children-and-Young-People-revised-2011.pdf](#)
-  [Teaching Touching Safety Opt-Out.pdf](#)

BISHOP ENGLAND
HIGH SCHOOL



Fostering a faith community characterized by the Gospel message of mutual respect and charity.

6/8/2020

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Academic Excellence in a Caring Environment

Summer Reading List 2003

Track Team Fund Raiser: Battling Bishop Afghan



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363 Seven Farms Drive
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CONTACT

Phone: 843-849-9599
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BEHS: Our Mission

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Bishop England High School

Our Mission

As an institution of the Catholic Church, it is the mission of Bishop England High School to foster a faith community characterized by the Gospel message of mutual respect and charity. The school endeavors to promote the spiritual, intellectual, and physical growth of the individual through the combined efforts of parents/guardians and faculty by establishing the best possible environment for learning: a climate of safety, trust, and respect for the individual and an appreciation for the acquisition of learning.

- adapted from BEHS Faculty Handbook, revised, July 2000

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EXHIBIT 20

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Deposition of:

Gary Nestler

=====

Gary Nestler, et al
v.
The Bishiop of Charleston, a Corporation Sole, Bishop
England High School, et al

Case #: 2:21-cv-00613-RMG

October 1, 2021

=====



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JA1237

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Gary Nestler, Viewed CASE NO. 2:21-cv-00613-RMG
Student Female 200,
Viewed Student Male
300, on behalf of
themselves and all
others similarly
situated,

Plaintiff(s),

-vs-

The Bishop of Charleston,
a Corporation Sole,
Bishop England High School,
Tortfeasors 1-10, The Bishop
of the Diocese of Charleston,
in his official capacity, and
Robert Guglielmone, individually,

Defendant(s).

DEPOSITION OF: GARY NESTLER

DATE TAKEN: FRIDAY, OCTOBER 1, 2021

TIME: 10:07 A.M.

PLACE: TURNER PADGET GRAHAM LANEY, PA
40 Calhoun Street, Ste. 200
Charleston, SC 29401

REPORTED BY: Nicole D. White
Certified Court Reporter
Notary Public

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1 A P P E A R A N C E S

2

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14 REPRESENTING THE DEFENDANT:

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I N D E X

INDEX OF EXHIBITS

(No exhibits were offered or marked.)

STIPULATIONS

It is hereby stipulated and agreed by and between the parties hereto, through their respective counsel, that the reading and signing of the transcript is reserved by the Deponent.

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1 (GARY NESTLER, having been first duly
2 sworn, testified as follows:)

3 E-X-A-M-I-N-A-T-I-O-N

4 BY MR. DUKES:

5 Q. Good morning, Mr. Nestler.

6 A. Good morning, sir.

7 Q. I'm Richard Dukes. We just met. I'm
8 the lawyer representing the defendants in the
9 case you've brought that's styled Nestler versus
10 Bishop England High School, the Bishop of
11 Charleston and Bishop Guglielmone.

12 We're here to take your deposition
13 today. Have you ever been deposed before?

14 A. Yes, sir.

15 Q. When?

16 A. Don't recall the exact dates.

17 Q. Okay. Was it in a lawsuit in which
18 you were a party?

19 A. Yes, sir.

20 Q. What kind of case was it?

21 A. Traffic accident.

22 Q. Okay. We'll come to that. There are
23 a few rules I have to explain to you.

24 A. Yes, sir.

25 Q. The rules require me -- the Rules of

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1 Civil Procedure require me to tell you these
2 things.

3 Now that your deposition has
4 commenced, you can't talk to your lawyers about
5 the substance of your testimony. In fact, you
6 can't talk to anybody about the substance of your
7 testimony until we're done.

8 If you do talk to either of your
9 lawyers or to anybody else, I can ask you about
10 that. The only thing you're allowed to talk to
11 your lawyers about that would remain under the
12 privilege is a discussion of whether to invoke a
13 privilege. That's never been an issue in my
14 depositions. I don't anticipate it coming up.

15 If you don't understand one of my
16 questions, you have to ask me to clarify. You
17 can't turn to your lawyer and ask, "What's he
18 asking me?"

19 A. Yes, sir.

20 Q. Our court reporter would appreciate it
21 if you answered my questions out loud and rather
22 than an "uh-huh" or "huh-uh" or a head nod. I'll
23 remind you if that happens, because it does.

24 A. Yes, sir.

25 Q. The other thing our court reporter

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1 would appreciate is if we tried not to talk over
2 each other. If you'll let me finish my question,
3 I'll let you finish your answer.

4 A. Thank you.

5 Q. If at any time during your deposition
6 you want to go back and clarify something you had
7 answered earlier, feel free to do so, just tell
8 me.

9 A. Yes, sir.

10 Q. I don't anticipate this taking a long
11 time. Typically the bar lawyers like to take a
12 break every hour and we'll try to do that. If
13 you need to take a break, please let me know and
14 we'll do that.

15 A. Thank you.

16 Q. Are you under any -- on any
17 medications that will affect your memory today?

18 A. No, sir.

19 Q. What do you do for a living?

20 A. I work for a software company.

21 Q. Is that IBM?

22 A. No, sir.

23 Q. Okay. Who is that?

24 A. Priority 5 Holdings.

25 Q. And what does Priority 5 Holdings do?

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1 A. They sell software.

2 Q. What kind of software?

3 A. Anti-terrorism software.

4 Q. How is it -- I mean, explain the
5 anti-terrorism software business to me and how
6 your software -- the software you sell works.

7 A. The software that we sell is
8 considered a common operating picture. It takes
9 the spare data sources from different agencies,
10 users, both public and private, and brings it
11 together and allows for the users to see in one
12 piece of glass what's going on and gives them
13 situational awareness, allows them to manage
14 consequences of what's happening and then allows
15 them to form their decisions with the facts that
16 they're gleaning from the data.

17 Q. Who are your customers?

18 A. Both public and private sector.

19 Q. Okay. So government?

20 A. Yes, sir.

21 Q. And who in the private sector would be
22 your customers?

23 A. You have just normal industry such as
24 Amtrak.

25 Q. Okay.

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1 A. And then others who --

2 Q. Which pretends to be a
3 non-governmental entity.

4 A. Okay.

5 Q. Who else?

6 A. I'd have to provide you with a list of
7 private organizations, but we need to get
8 permission to do that.

9 Q. What do you do for Priority Software?

10 A. I'm a senior vice president.

11 Q. And it's Priority 5 --

12 A. Holdings.

13 Q. -- Holdings. Okay.

14 MR. SLOTCHIVER: And Rich, if I
15 could just add one thing if you don't mind.
16 I'm not testifying, but I know the
17 deposition today is limited to class
18 certification. Certainly I'm gonna give you
19 a lot of latitude with it, but in case
20 something comes up, I just wanted to state
21 in advance that we'll raise that issue if it
22 comes if up if we believe it to be
23 problematic. I'm not waiving it by not
24 asserting it now. I'm hoping I don't ever
25 have to assert it. But if I do, I wanted

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1 the record to reflect that I'm reserving
2 that right.

3 MR. DUKES: Okay. If it becomes
4 an issue, we'll deal with that.

5 MR. SLOTCHIVER: Perfect.

6 BY MR. DUKES:

7 Q. Walk me through your educational
8 background, please.

9 A. High school, college.

10 Q. Where did you go to college?

11 A. Northeastern University.

12 Q. In Boston?

13 A. Yes, sir.

14 Q. Okay. What was your degree in?

15 A. Organization, communications is the
16 major. Biology and chemistry as a minor.

17 Q. Okay. Did you have any postgraduate
18 education?

19 A. Yes, I have.

20 Q. And what's that?

21 A. I've had two universities. One is
22 Pacific College with health and sciences in New
23 York. And then the Medical University of South
24 Carolina in Charleston.

25 Q. Okay. What degrees did you earn?

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1 A. The Medical University of South
2 Carolina was a doctorate in healthcare
3 administration, policy, and leadership.

4 Q. Ph.D.?

5 A. It's called a doctorate of healthcare
6 administration and policy, correct.

7 Q. And what about at Pacific College?

8 A. That was a position with the diplomat
9 of traditional Chinese medicine.

10 Q. Walk me through your work history,
11 please.

12 A. Bay Drug was the first.

13 Q. What did you do for Bay Drug?

14 A. Delivered pharmaceuticals.

15 Q. Okay. What kind of pharmaceuticals
16 did you deliver?

17 A. My father owned a drugstore.

18 Q. Okay. What -- and I guess let's
19 qualify it to after you completed your education.

20 A. High school education or college?

21 Q. College.

22 A. Summit Office Supply.

23 Q. Okay. When was that?

24 A. The year I graduated college.

25 Q. Which was when?

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1 A. 1979. Oh, no, '83. Sorry, 1983, I
2 believe.

3 Q. Okay. And what did you do for Summit
4 Office Supply?

5 A. Sales.

6 Q. Where was your next place of
7 employment?

8 A. Microcomputer Publishing Center.

9 Q. What did you do for them?

10 A. Computer graphics and sales.

11 Q. Okay. And when did you work for
12 Microcomputer?

13 A. I'd have to look at my CV. I don't
14 recall the years.

15 Q. Okay. Where did you go to work next?

16 A. Landmark Press Publishing.

17 Q. And what did you do for them?

18 A. Sales and marketing.

19 Q. What sorts of materials did Landmark
20 Press publish?

21 A. Legal briefs, bounded books,
22 invitations, events, collateral material for
23 marketing.

24 Q. How long did you work for Landmark
25 Press?

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1 A. I'd have to look at the dates.

2 Q. More than a year, more than two years?

3 A. Yes, sir. More than two years.

4 Q. Where did you go to work next?

5 A. D.F. White.

6 Q. What did you do for E.F. (sic) White?

7 A. Delta, D as in delta.

8 Q. Oh.

9 A. Sales, marketing, and management.

10 Q. What did D.F. White do?

11 A. Printing.

12 Q. Okay. How long did you work there?

13 A. I'd have to look at my resume.

14 Q. Was it more than a couple years, five
15 years, 10 years?

16 A. Not long. Not more than five years.
17 Less than five years.

18 Q. Do you know about what year you worked
19 for D.F.?

20 A. I do not.

21 Q. Where was your next place of
22 employment?

23 A. I believe the next place of employment
24 was at The Medical University of South Carolina.

25 Q. What did you do for the Medical

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1 University?

2 A. I was the director of integrative
3 medicine.

4 Q. What is integrative medicine?

5 A. Integrative medicine is considered a
6 combination of conventional allopathic medicine
7 along with non-conventional methods, such as
8 acupuncture, nutraceuticals, herbal medicines.

9 Q. What qualified you to do that? You've
10 been in the printing business for a while and
11 sales.

12 A. Uh-huh.

13 Q. Why did you go into integrative
14 medicine?

15 A. Why did I go into integrative
16 medicine?

17 Q. Uh-huh.

18 A. Because I sought therapies for
19 migraine headaches while I was working.

20 Q. Okay. Were you a migraine sufferer?

21 A. No, sir.

22 Q. Okay. What triggered your interest in
23 providing relief for migraines?

24 A. To relieve my migraine headaches.

25 Q. I must have misunderstood you. I

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1 thought you said you didn't suffer from
2 migraines?

3 A. I did not suffer from migraines. I
4 had migraine headaches.

5 Q. Okay. How long did you stay at MUSC?

6 A. From 1998 through 2003, I believe.

7 Q. Okay. Why did you leave MUSC?

8 A. I chose to not continue the practice
9 of medicine as a result of 9/11.

10 Q. Why is that? How did that impact your
11 career decision?

12 A. I was previously from New York City
13 where I lived and my neighbors all perished in
14 the event of 9/11.

15 Q. And were you practicing medicine at
16 USC?

17 A. I was not practicing medicine at USC.

18 Q. What did you do as director of
19 integrative medicine?

20 A. At MUSC.

21 Q. Yeah.

22 A. I was practicing medicine.

23 Q. Okay. Did you have a license?

24 A. Yes, I did.

25 Q. What license did you hold?

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1 A. I held a license through the medical
2 board of South Carolina as an acupuncturist.

3 Q. Do acupuncturists practice medicine?

4 A. Yes, they do.

5 Q. What are you -- when you practice
6 medicine, what were you allowed to do?

7 A. Would you clarify?

8 Q. Could you write prescriptions?

9 A. No, sir.

10 Q. Could you prescribe therapies?

11 A. Yes, sir.

12 Q. What kind of therapies could you
13 prescribe?

14 A. Integrative medical therapies.

15 Q. And what are those?

16 A. Acupuncture, nutraceutical medicine,
17 massage therapy, chiropractic care.

18 Q. After you'd finished your tenure at
19 MUSC, where did you go to work?

20 A. I started a small consulting firm.

21 Q. What was that consulting firm called?

22 A. The Canary Group.

23 Q. McNair Group?

24 A. The Canary Group.

25 Q. The Canary Group. I'm sorry.

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1 A. That's okay.

2 Q. I'm hard of hearing.

3 A. I'll speak up. I apologize.

4 Q. What kind of consulting did The Canary
5 Group do?

6 A. Crisis and emergency management
7 consulting.

8 Q. How big a company was The Canary
9 Group?

10 A. It was a sole proprietor.

11 Q. Is it still operating?

12 A. No, sir.

13 Q. When did it shut down?

14 A. I'd have to look at the date.

15 Q. Was it before 2005, before 2010?

16 A. Certainly before 2010.

17 Q. Do you know how long you worked, you
18 operated The Canary Group?

19 A. I'd have to look at my resume.

20 Q. How many clients did you have with The
21 Canary Group?

22 A. Approximately four.

23 Q. Four?

24 A. Uh-huh.

25 Q. Which ones? Who were they?

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1 A. Dollar Thrifty was one.

2 Q. Uh-huh.

3 A. And the other three were Charleston --
4 City of Charleston.

5 Q. Okay.

6 A. And the other two I don't recall their
7 names.

8 Q. When you stopped doing crisis and
9 emergency management consulting with the Canary
10 Group, where did you go to work?

11 A. University of North Carolina, Chapel
12 Hill.

13 Q. What did you do at UNC?

14 A. I taught undergraduate and graduate
15 students.

16 Q. In what?

17 A. Healthcare and terrorism.

18 Q. What's the -- I mean, what was the
19 focus of that?

20 A. The impact of terrorism on the
21 healthcare system of the United States.

22 Q. I see. And how long did you stay at
23 Chapel Hill?

24 A. I'd have to check.

25 Q. Five years?

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1 A. Under five years.

2 Q. How many classes did you teach at UNC?

3 A. Per year?

4 Q. Yeah.

5 A. One.

6 Q. Back when I was a history professor,
7 one calendar year I taught 51 semester hours.
8 Yes, it was brutal.

9 A. Uh-huh.

10 Q. When you left UNC, where did you go to
11 work?

12 A. IBM.

13 Q. And what did you do for IBM?

14 A. I was an associate partner responsible
15 for their global public safety practice.

16 Q. Okay. What did the public safety
17 practice entail?

18 A. Engaging with corporate as well as
19 clients of IBM focused on public safety.

20 Q. Safety of IBM's facilities or safety
21 of the public at large, what are we talking
22 about?

23 A. Both.

24 Q. Okay. And how did IBM's public safety
25 practice work to ensure the safety of the

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1 community?

2 A. I do not agree with the word that you
3 used, "ensure". It had nothing to do with
4 ensuring safety.

5 Q. Okay. What did they do then?

6 A. They provided software and hardware to
7 help agencies, communities, as well as their own
8 organization to provide methodologies in the
9 software to help senior level decision makers to
10 make decisions regarding public safety.

11 Q. How long did you stay at IBM?

12 A. Eight years.

13 Q. Do you know what year you left IBM?

14 A. Yes.

15 Q. What year was that?

16 A. 2017.

17 Q. Were you promoted beyond associate
18 partner?

19 A. No, sir.

20 Q. Okay. Did you stay in the same job
21 with IBM the entire eight years?

22 A. No, sir.

23 Q. What else, what other positions did
24 you hold?

25 A. Consultant, managing consultant,

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1 senior managing consultant.

2 Q. And what did you do as a senior
3 managing consultant?

4 A. Same job I did as the associate
5 partner with subject matter expertise.

6 Q. Okay. Where did you go to work after
7 IBM?

8 A. Priority 5 Holdings.

9 Q. Are you the sole owner of Priority 5?

10 A. No, sir.

11 Q. Who else? Who owns it?

12 A. It's owned by shareholders.

13 Q. Is it publicly traded?

14 A. No, sir.

15 Q. How many shareholders does it have?

16 A. I do not know.

17 Q. Are you a shareholder?

18 A. Yes, sir.

19 Q. What percentage ownership do you hold?

20 A. I do not know percentage.

21 Q. What does Priority 5 -- what's its
22 volume of business annually?

23 A. I can't answer that.

24 Q. Okay. Do you know what its earnings
25 are?

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1 A. I can't answer that.

2 Q. You can't because you -- it's
3 confidential or you can't because you don't know?

4 A. I can't because it's confidential.

5 Q. Okay. And do you hold any other jobs
6 other than Priority 5 Holdings?

7 A. No, sir.

8 Q. Have you ever been sued before?

9 A. Other than the traffic accident you
10 referred to earlier, no, sir, I don't believe I
11 have.

12 Q. Okay. The records from the courthouse
13 indicate -- and this is just a name search --

14 A. Uh-huh.

15 Q. -- that a Gary Nestler sued a man
16 named Thomas Acreman (ph) in 2003. Was that you?

17 MR. SLOTCHIVER: Rich, I'm not
18 sure how -- if you can enlighten me how this
19 applies to the subject we're here for today.

20 MR. DUKES: His adequacy as
21 class representative.

22 BY MR. DUKES:

23 Q. Is that your lawsuit?

24 A. I don't recall the person's name.

25 Q. Okay. Was it -- could that have been

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1 the car wreck case?

2 A. Could it have been, I imagine so.

3 Q. Okay. Do you know what this 2003
4 lawsuit that ended in 2005 was about?

5 A. I do not, sir. I do not recall.

6 Q. All right. In 2006 a case, Gary S.
7 Nestler, plaintiff, et. al., versus Louise
8 Fraiser (ph), et. al., was filed. What was that
9 case?

10 A. I do not recall that.

11 Q. You've had more than one foreclosure
12 action filed against you, haven't you?

13 A. Yes.

14 Q. Wells Fargo filed a foreclosure action
15 in 2009 -- in 2009 and Deutsche Bank filed one in
16 2012, correct?

17 A. Yes.

18 Q. What property were these banks
19 foreclosing on?

20 A. What were the dates?

21 Q. Wells Fargo filed suit in 2009.
22 September 11th, 2009.

23 A. Okay.

24 Q. What property were they foreclosing
25 on?

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1 A. I believe that was on the Isle of
2 Palms.

3 Q. Your personal residence?

4 A. Yes, sir.

5 Q. And why were you not paying your
6 mortgage?

7 A. There was an issue with the mortgage.

8 Q. What was that issue?

9 A. Who owned the mortgage.

10 Q. Explain that to me, please.

11 A. I don't think I can.

12 Q. Why not?

13 A. Because I didn't understand the
14 complexities of who owned the mortgage and it has
15 been resolved.

16 Q. You understand that lenders sell
17 mortgages to either Fannie Mae or Freddie Mac or
18 to investment pools, just being securitized; did
19 you understand that?

20 A. Do I understand that?

21 Q. Yes.

22 A. I do understand that.

23 Q. Did you in 2009 when you stopped
24 paying on your mortgage?

25 A. I did not.

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1 Q. How far in arrears were you?

2 A. I do not recall.

3 Q. How was that foreclosure action
4 resolved?

5 A. Through mediation.

6 Q. Okay. Who was the mediator?

7 A. I do not recall his name.

8 Q. Who was your lawyer in that
9 foreclosure case?

10 A. Justin Kahn, K-A-H-N.

11 Q. Was the title insurer involved in that
12 case at all?

13 A. I believe he was or they were.

14 Q. Who was the title insurer?

15 A. I do not recall.

16 Q. In 2010 Signature Kitchens and Baths
17 of Charleston filed a lawsuit against you. What
18 was that case about?

19 A. I do not recall.

20 Q. Was it a mechanics lien case?

21 A. Again, I do not recall.

22 Q. Deutsche Bank filed an action to
23 foreclose in 2012. What property was that -- did
24 that involve?

25 A. I believe it was the same case.

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1 Q. It was not a new foreclosure action?
2 I mean, it bears a 2012 case number, whereas the
3 Wells Fargo was a 2009 case number.

4 A. (Indicating).

5 Q. Why did Deutsche Bank foreclose on
6 you?

7 A. I don't recall.

8 Q. Were you in default on your mortgage a
9 second time?

10 A. I don't believe so, sir.

11 Q. Had you refinanced your Wells Fargo
12 mortgage with Deutsche Bank?

13 A. No, sir.

14 Q. What were the grounds for Deutsche
15 Bank to file a foreclosure action against you?

16 A. I do not recall.

17 Q. Who was your lawyer in that case?

18 A. Justin Kahn.

19 Q. Did you retain Mr. Kahn or did an
20 insurance carrier retain --

21 A. I retained Mr. Kahn.

22 Q. In 2014 C & T Foundation, LLC filed a
23 suit against you. What was that case about?

24 A. He refused to come back to our primary
25 residence now and repair the cement foundation

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1 that he poured.

2 Q. Okay. But why was C & T filing suit
3 against you?

4 A. Because we did not pay him the
5 hold-back money.

6 Q. What was the resolution of that case?

7 A. I believe he paid us some money.

8 Q. And in 2015 you and Julie Nestler --
9 is that your wife --

10 A. Yes, sir.

11 Q. -- filed a lawsuit against Joseph E.
12 Fields. Actually filed separate lawsuits against
13 Joseph E. Fields. Who was Joseph Fields?

14 A. He was the gentleman who we were
15 involved in a car accident that hit us on 17 from
16 behind.

17 Q. And that's the case in which you were
18 awarded something on the order of \$7,000 in
19 damages?

20 A. I believe so.

21 Q. And who is your lawyer in that case?

22 A. Dan Slotchiver.

23 Q. Okay. Any other lawsuits in counties
24 other than Charleston that you've been a party
25 to?

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1 A. I do not recall that.

2 Q. What is Gansevoort, LLC?

3 A. Excuse me?

4 Q. A company, an LLC that is associated,
5 I believe you're the registered agent for it.
6 Gansevoort, G-A-N-S-E-V-O-O-R-T, LLC?

7 A. I do not know.

8 Q. I noted that you have a pilot's
9 license; is that correct?

10 A. No, sir.

11 Q. You've served on a couple of boards in
12 town, haven't you?

13 A. Yes, sir.

14 Q. Which ones?

15 A. Charleston Police Department.

16 Q. Okay. What did you do for the
17 Charleston Police Department?

18 A. I was a board committee member and
19 then I became the board chair.

20 Q. When were you the board chair?

21 A. I'd have to look at the dates.

22 Q. What -- it was a foundation, wasn't
23 it?

24 A. It was the Charleston Police Fund.

25 Q. What did the Police Fund do?

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1 A. Raised money to provide for leadership
2 for police department -- for Charleston Police
3 Department, to acquire K9s for their service,
4 provide equipment for their police officers,
5 which included body cams, SWAT material and
6 vehicles.

7 Q. Okay. And are you still on the
8 Charleston Police Fund Board?

9 A. No, sir.

10 Q. When did you rotate off?

11 A. I'd have to look at my resume.

12 Q. You're on the board of Oceanside
13 Academy, too, aren't you?

14 A. Yes, sir.

15 Q. And Oceanside is experiencing its own
16 challenges right now?

17 A. Yes, sir.

18 Q. Explain to me what the dispute between
19 the chartering organization and Oceanside's
20 administration is?

21 A. There was an --

22 MR. SLOTCHIVER: Rich, how is
23 that related to this?

24 MR. DUKES: Again, it goes to
25 his adequacy as a representative of the

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1 class.

2 MR. SLOTCHIVER: A dispute
3 between Oceanside and the school board has
4 something to do with his adequacy as
5 representation?

6 MR. DUKES: Yeah.

7 BY MR. DUKES:

8 Q. Please explain what's going on with
9 the chartering organization.

10 A. The chartering organization has
11 accused the managing organization who manages
12 Oceanside of violating something called an EB5
13 rule, of which Oceanside has no part of.

14 Q. I'm sorry?

15 A. Of which Oceanside has no part of.

16 Q. What is the Oceanside board's role in
17 the financial management of Oceanside?

18 A. We govern and set policy.

19 Q. Does that include paying a management
20 company?

21 A. It includes paying a management
22 company.

23 Q. Okay. We're gonna turn now to your
24 suit against Bishop England and others. Tell me,
25 sir, you've been on -- how long have you been on

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1 the Oceanside board?

2 A. I'd have to look. A couple years.

3 Q. Couple years? Was it while your
4 daughter was a student at Oceanside?

5 A. Yes, sir.

6 Q. Is she still a student at Oceanside?

7 A. No, sir.

8 Q. Has she graduated?

9 A. Yes, sir.

10 Q. Where is she in college?

11 A. In Florida.

12 Q. Is she playing volleyball still?

13 A. No, sir.

14 Q. Did she play volleyball at Oceanside?

15 A. She did not, sir.

16 Q. When she was at Bishop England, she
17 was a volleyball player, right?

18 A. Yes, sir.

19 Q. What sport did she pursue at
20 Oceanside?

21 A. Waterskiing.

22 Q. Waterskiing doesn't seem to me to be a
23 big scholarship sport, is it?

24 A. It depends on how you define "big".

25 Q. Is she on a -- currently on a

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1 waterskiing scholarship?

2 A. No, sir.

3 Q. Does she ski for the school in
4 Florida?

5 A. She does not.

6 Q. What school in Florida is she
7 attending?

8 A. Lynn University.

9 Q. Where is that?

10 A. In Boca Raton.

11 Q. Tell me in your opinion, what is it
12 that schools do?

13 A. Educate children.

14 Q. Did your daughter receive an education
15 when she attended Bishop England?

16 A. Yes.

17 Q. She had teachers?

18 A. Yes, she had teachers.

19 Q. And those teachers have to be paid?

20 A. Yes, I imagine they have to be paid.

21 Q. And she was attending school in person
22 in the school facilities --

23 A. Yes.

24 Q. -- correct? When did she leave Bishop
25 England?

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1 A. I'd have to look.

2 Q. I believe it was middle of the year in
3 her sophomore year.

4 A. Okay.

5 Q. Do you know what year that would have
6 been?

7 A. We'd have to go backwards since she
8 just graduated this past June.

9 Q. She graduated June of 2021?

10 A. No, January of '20 -- yeah,
11 January 2021.

12 Q. January?

13 A. Excuse me, June of 2021.

14 Q. Okay. So her sophomore year would
15 have been what, 2018?

16 A. Again, I defer to a calendar.

17 Q. Okay. Did you pay tuition to Bishop
18 England?

19 A. Yes.

20 Q. Was your wife also in the -- required
21 to, not so much guarantee, but you and your wife
22 were both obligated to pay tuition, were you not?

23 A. We're married, yes, sir.

24 Q. She's not a party to this case?

25 A. No, sir.

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1 Q. Why not?

2 A. Because I'm the party to the case.

3 Q. When did you decide to file this
4 lawsuit?

5 MR. SLOTCHIVER: To the extent
6 that this calls for any attorney/client
7 privileged communications, I'm going to
8 instruct you not to answer.

9 THE DEPONENT: Okay.

10 BY MR. DUKES:

11 Q. When did you decide to file? I'm not
12 asking for any communications you had with any of
13 these lawyers.

14 A. I can't answer.

15 Q. What are you seeking in filing this
16 lawsuit?

17 MR. SLOTCHIVER: Same thing, to
18 the extent that it deals with any attorney/
19 client communications between you and your
20 counsel, it's a privilege and you're
21 instructed not to answer.

22 THE DEPONENT: I can't answer.

23 BY MR. DUKES:

24 Q. Are you following your counsel?

25 A. No, sir.

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1 Q. Then why can't you answer that
2 question?

3 A. Let me rephrase it. I am following
4 the advice of counsel.

5 MR. DUKES: Okay. We'll deal
6 with that.

7 BY MR. DUKES:

8 Q. How did you find all of these lawyers
9 who are enrolled as counsel for the class?

10 A. Excuse me?

11 Q. How did you find all the lawyers? You
12 got Mr. Slotchiver that you have a pre-existing
13 relationship?

14 A. Uh-huh.

15 Q. Mr. Richter's involved,
16 Mr. Halversen's involved, and Carl Solomon from
17 Columbia is involved. How did that team come to
18 be put together?

19 MR. SLOTCHIVER: And to the
20 extent that this is invading attorney/client
21 privileged communications, I'm going to
22 instruct you not to answer.

23 BY MR. DUKES:

24 Q. And you're gonna follow your lawyer's
25 instructions on that?

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1 A. Yes, sir.

2 Q. What investigation did you perform
3 regarding each of the defendants in this lawsuit?

4 A. I can't answer that question.

5 Q. Why not?

6 A. Because that's privileged
7 conversations I've had with my attorneys.

8 Q. Your lawyer's not asserted a
9 privilege.

10 MR. SLOTCHIVER: Can you ask the
11 question again, please?

12 BY MR. DUKES:

13 Q. Yeah. What investigation did you
14 do -- you --

15 A. Oh, I'm sorry, go ahead.

16 Q. -- you do prior to filing this
17 lawsuit?

18 MR. SLOTCHIVER: Same thing. To
19 the extent you can answer this question
20 without invading attorney/client privilege,
21 you're welcome to answer the question. Just
22 don't talk about communications you've had
23 with counsel.

24 THE DEPONENT: I've done no
25 investigations.

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1 BY MR. DUKES:

2 Q. None at all? Never gone into a high
3 school locker room?

4 A. No, sir.

5 Q. What is your complaint about Bishop
6 Guglielmone? Why are you suing him?

7 A. Remind me who that person is and his
8 name again, please.

9 Q. Bishop Robert Guglielmone. He's the
10 Bishop of Charleston.

11 A. Uh-huh.

12 Q. Why are you suing him?

13 A. And who is he, again?

14 Q. He is the Bishop of Charleston.

15 A. Okay. As I understand it, that he is
16 connected with Bishop England or the leader of
17 the archdiocese or whatever you said the proper
18 term is, and that he is a party to what has gone
19 on at Bishop England.

20 Q. How is he a party to what's gone on at
21 Bishop England?

22 A. Because he's part of the leadership.

23 Q. What is your knowledge of his role in
24 the leadership of Bishop England?

25 MR. SLOTCHIVER: And to the

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1 extent that it has to deal with attorney/
2 client communications, I'm going to instruct
3 you not to answer. To the extent you can
4 answer the question outside of that, feel
5 free to answer the question and please do
6 answer the question.

7 THE DEPONENT: As I understand
8 it, he oversees the schools, Catholic
9 schools.

10 BY MR. DUKES:

11 Q. What has he done individually to harm
12 you?

13 A. Individually to harm me?

14 Q. Yes.

15 A. I'm not sure I can answer that
16 question.

17 Q. Okay. Well, you've sued him in his
18 individual capacity. Can you not identify
19 anything that you contend he's done wrong that
20 harmed you?

21 MR. SLOTCHIVER: And the same
22 instruction, to the extent you can answer
23 the question without invading the
24 attorney/client privilege, please do.

25 THE DEPONENT: I cannot answer

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1 that question.

2 BY MR. DUKES:

3 Q. Because your attorney instructed you
4 not to answer it?

5 A. Again, I cannot answer the question.

6 Q. Are you following your attorney's
7 instruction?

8 A. Yes, sir.

9 Q. Okay. In your complaint, you identify
10 unnamed tortfeasors 1 through 10. Who are they?

11 A. I can't answer that question.

12 Q. Why not?

13 A. Because they're attorney/client
14 privilege.

15 Q. Have you consulted with any other
16 members of your, I'm gonna call them parents,
17 other parents of Bishop England students about
18 this lawsuit?

19 A. No, sir.

20 Q. And I understand that people who pay
21 tuition may not always be parents, but it's just
22 easier rather than list everybody who might
23 possibly have paid tuition to Bishop England,
24 you've not communicated with any of them?

25 A. No, sir.

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1 MR. SLOTCHIVER: Object to the
2 form.

3 BY MR. DUKES:

4 Q. Has anyone reached out to you?

5 A. No, sir.

6 Q. You've never been in the locker rooms
7 at Bishop England, correct?

8 A. No, sir.

9 Q. Never coached a game?

10 A. No, sir.

11 Q. Have you ever sent a letter or an
12 e-mail to current or former Bishop England
13 parents about this lawsuit?

14 A. No, sir.

15 Q. Did you attend the press conference
16 that Mr. Richter gave when he filed this lawsuit?

17 A. No, sir.

18 Q. Do you -- are you on Facebook or
19 social media?

20 A. I am.

21 Q. Have you ever posted anything about
22 this, the Bishop England situation?

23 A. No, sir.

24 Q. Do you post comments on any other
25 blogs or on a Twitter page or other social media?

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1 A. I do.

2 Q. What do you typically post about?

3 A. I don't typically post anything.

4 Q. You're a ghost, I think is what the
5 kids call it?

6 A. No, sir.

7 Q. Do you post any content on social
8 media at all?

9 A. Rarely.

10 Q. Okay. Have you talked to anybody at
11 Bishop England, current or former students, about
12 the locker rooms?

13 A. No, sir.

14 Q. Can you describe the locker rooms at
15 Bishop England for me?

16 A. No, sir.

17 Q. What -- explain to me the facts that
18 Bishop England promised a certain education.
19 What education did Bishop England promise?

20 A. High school education.

21 Q. And they provided that to your
22 daughter when she attended there, right?

23 A. They provided a high school education.

24 Q. What education was not delivered as
25 promised?

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1 A. I'm not sure I can answer that
2 question.

3 Q. Was your daughter's education at B.E.
4 somehow objectionable or she didn't get a good
5 education?

6 A. Could you re-ask the question?

7 Q. Yeah. What is the problem with the
8 education that Bishop England provided your
9 daughter in the year and a half she attended?

10 A. I don't think it's a problem with her
11 education.

12 Q. Okay. Why did she move to Oceanside?

13 A. Because of the lack of a safe
14 environment being provided to her.

15 Q. Explain that to me.

16 A. She did not feel safe.

17 Q. Why is that?

18 A. You'd have to ask her directly.

19 Q. Did you alert Bishop England, anyone
20 at Bishop England that your daughter felt unsafe?

21 A. Yes, sir.

22 Q. Who?

23 A. Maryann Tucker, Patrick Finneran.

24 Q. And what did you tell them was unsafe
25 about the school?

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1 A. I alerted them that my daughter did
2 not feel safe in the school.

3 Q. Okay. Was she being bullied, was --
4 what did she feel unsafe about?

5 A. Re-ask that question, I'm sorry.

6 Q. What did she feel unsafe about?

7 A. She felt unsafe about being in the
8 presence of a volleyball coach.

9 Q. Jim McClellan?

10 A. Yes, sir.

11 Q. Okay. She didn't like her coach. Was
12 he the head coach or --

13 MR. SLOTCHIVER: Object to the
14 form.

15 THE DEPONENT: Would you re-ask
16 the question?

17 BY MR. DUKES:

18 Q. Was Jim McClellan the head coach or
19 assistant coach?

20 A. I believe he was the assistant. I
21 think he was her head coach, but the assistant
22 coach.

23 Q. Okay. How was he her head coach, but
24 an assistant coach?

25 A. You have a varsity and a junior

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1 varsity.

2 Q. And your daughter was on the JV team?

3 A. I believe so.

4 Q. Why did your daughter not feel safe in
5 the presence of Jim McClellan?

6 A. Because he continued to make rude and
7 sexual comments and touch the girls
8 inappropriately, touched my daughter
9 inappropriately.

10 Q. Okay. How long after McClellan --
11 well, when did your daughter report that
12 McClellan had engaged in inappropriate -- in some
13 -- what she considered inappropriate conduct to
14 you?

15 A. Don't recall it.

16 Q. How long did you wait to report it to
17 Bishop England?

18 A. Pretty immediate.

19 Q. What was the result of your complaint?

20 A. Could you ask the question again?

21 Q. Yeah. What happened after you went to
22 Maryann Tucker and Patrick Finneran to complain
23 about Jim McClellan, what happened?

24 A. Nothing.

25 Q. And did you complain about McClellan

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1 before or after you transferred your daughter to
2 Oceanside?

3 A. Before.

4 Q. How long before?

5 A. I can't tell you that.

6 Q. Was it in the same semester?

7 A. I would have to look at a calendar.

8 Q. To your knowledge, has your daughter
9 ever been covertly photographed in the locker
10 rooms?

11 A. I don't know that.

12 Q. Did you confront Coach McClellan?

13 A. Yes.

14 Q. When was that?

15 A. Excuse me, re-ask that question again.

16 Q. Did you confront your daughter's
17 volleyball coach directly?

18 A. I don't think I'd use the word,
19 "confront".

20 Q. Did you talk to him?

21 A. Yes.

22 Q. When did you talk to him?

23 A. After I spoke with Ms. Tucker.

24 Q. And well, what did Ms. Tucker tell you
25 when you talked to her?

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1 A. That she was going to handle it.

2 Q. Did she say how she was going to
3 handle it?

4 A. No, sir.

5 Q. Did she suggest to you that you should
6 talk to Coach McClellan?

7 A. I don't recall that.

8 Q. Okay. What did you say when you
9 talked to Jim McClellan?

10 A. I don't recall exactly what I said.

11 Q. Do you recall generally what you said?

12 A. I do not.

13 Q. Tell me about your conversations with
14 Patrick Finneran.

15 A. It was the same as with Ms. Tucker,
16 because they were both in her office together.

17 Q. Did you make an appointment to see
18 them?

19 A. I did.

20 Q. Were they receptive to your complaints
21 about Coach McClellan?

22 A. Would you repeat the question?

23 Q. Were they receptive?

24 A. What do you mean by, "receptive"?

25 Q. Did they ask questions, did they try

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1 to find out what was going on, what your
2 complaint was?

3 A. Yes, they did try to find that out.

4 Q. Okay. And did you tell them
5 everything you knew?

6 A. Yes, sir.

7 Q. Did they followup with you about what
8 had gone -- what their action was in result -- in
9 reaction to your complaint?

10 A. I believe they did.

11 Q. Okay. What did they tell you?

12 A. They were gonna handle it internally.

13 Q. Why is it that you believe that you're
14 entitled to a complete refund of all tuition you
15 paid to Bishop England?

16 MR. SLOTCHIVER: And once again,
17 to the extent that this deals with
18 attorney/client communications, I'm gonna
19 instruct you not to answer. To the extent
20 you can answer it outside of that, please
21 feel free.

22 THE DEPONENT: I cannot answer
23 that.

24 BY MR. DUKES:

25 Q. Because your attorney just instructed

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1 you not to?

2 A. I cannot answer that question.

3 Q. How have you been damaged by the
4 conduct of Bishop England High School?

5 A. How have I been damaged?

6 Q. Yes.

7 A. I cannot answer that question.

8 Q. Why not?

9 A. Because that's client/attorney
10 privilege.

11 MR. SLOTCHIVER: You can talk
12 about damages. I don't think that falls
13 within that.

14 THE DEPONENT: Okay. I would
15 say that how I was damaged, obviously,
16 economically.

17 BY MR. DUKES:

18 Q. You paid tuition?

19 A. Right.

20 Q. Your daughter got an education?

21 A. Right.

22 Q. That's what you paid for?

23 A. No, sir.

24 Q. What did you pay for?

25 A. For my daughter to get an education in

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1 a safe environment. That's why we picked Bishop
2 England.

3 Q. And the safe environment was she
4 didn't get along with her volleyball coach?

5 A. No, sir.

6 Q. What representation did anybody make
7 regarding the safety of Bishop England High
8 School?

9 A. Could you ask the question again?

10 Q. Did anybody tell you Bishop England
11 was safe?

12 A. Yes.

13 Q. Who?

14 A. Maryann Tucker, Patrick Finneran and I
15 unfortunately forgot the name of the registrar of
16 the school.

17 Q. And was that before your daughter
18 enrolled or after?

19 A. That was before.

20 Q. Okay. When did that take place?

21 A. I'd have to look at the calendar.

22 Q. Was it when she was in eighth grade?

23 A. I do not recall. I'll have to look at
24 the calendar.

25 Q. What did they tell you?

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1 A. That you're coming to Bishop England
2 not only for the education, but we provide a safe
3 environment and you can see that throughout.

4 Q. And Jim McClellan is the only part of
5 Bishop England that you consider to be not safe?

6 A. No, sir.

7 Q. What else?

8 A. There were some girls that were
9 bullying her.

10 Q. Okay. Where were they bullying her?

11 A. Throughout the school.

12 Q. Did you report that?

13 A. Yes, sir.

14 Q. And when did you report it?

15 A. I do not remember.

16 Q. Was it at the same time you complained
17 about Jim McClellan?

18 A. No, sir.

19 Q. No?

20 A. I don't believe so.

21 Q. Okay. Who did you complain to about
22 bullying?

23 A. Maryann Tucker, Patrick Finneran and
24 Cindy Baggett (ph).

25 Q. Did you identify the girls who were

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1 bullying your daughter?

2 A. Yes, sir.

3 Q. Who were they?

4 A. I do not recall.

5 Q. What were they doing?

6 A. Calling her names and basically
7 bullying.

8 Q. Okay. What action, if any, did the
9 school take?

10 A. None.

11 Q. Why not?

12 A. Can't answer that question.

13 Q. Your daughter had some behavior issues
14 at the school, didn't she?

15 A. Excuse me?

16 Q. Your daughter had some behavior
17 issues.

18 A. I'm not aware of that.

19 Q. Tell me how your daughter has been
20 impacted by Jeffrey Scofield's arrest?

21 MR. SLOTCHIVER: Rich, how does
22 that apply to the certification? His
23 daughter's not involved in this. His
24 daughter is not being listed as a class
25 representative. His daughter's not making a

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1 complaint about the windows on behalf of the
2 parents. How does this affect --

3 MR. DUKES: It's gonna go to
4 commonality. It also will go to the
5 adequacy of him as a representative of the
6 class.

7 MR. SLOTCHIVER: His daughter's
8 not a listed party in the lawsuit. There is
9 a class representatives who have been put
10 forth. The court's gonna have to determine
11 the adequacy of the class representatives.
12 You're asking him now about his daughter.
13 You can -- at that point you could ask any
14 random parent who has a kid at Bishop
15 England about their child and claim the same
16 thing. I don't believe that's what he's
17 here for. He's here for the certification
18 of the tuition paying class.

19 MR. DUKES: Okay. So is it your
20 position that discovery is limited to issues
21 of class certification?

22 MR. SLOTCHIVER: At this point.

23 MR. DUKES: Okay. Both sides?

24 MR. SLOTCHIVER: It's been the
25 mechanism that we've been working under.

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1 MR. DUKES: Okay. Duly noted.
2 It's a little bit after 11. Why don't we
3 take a quick break?

4 THE DEPONENT: Okay.

5 MR. DUKES: Not long.

6 (Whereupon, there was a short
7 break in the proceedings.)

8 BY MR. DUKES:

9 Q. Explain to me, Mr. Nestler, how all
10 parents were injured in a similar fashion, all
11 people who paid tuition were injured in a similar
12 fashion to you?

13 A. I can't speak to others, only myself.

14 Q. Why do you claim that all parents are
15 entitled to a refund of all the tuition they
16 paid?

17 A. Because if they have the same view of
18 the way I view it, then they should be entitled
19 to the same.

20 Q. Okay. So anybody whose kid was
21 bullied should get a full refund of their
22 tuition?

23 MR. SLOTCHIVER: That's not what
24 this case is about. It's not what the
25 testimony reflects.

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1 MR. DUKES: Don't do speaking
2 objections anymore, Dan.

3 MR. SLOTCHIVER: All right.
4 Object to the form.

5 MR. DUKES: Object to the form.
6 BY MR. DUKES:

7 Q. Well, how were the people in the class
8 you purport to represent injured?

9 A. The same way that I feel that I was
10 injured.

11 Q. That their kids weren't provided a
12 safe environment to go to school?

13 A. That is correct.

14 Q. Okay. And your daughter was bullied
15 by other girls, by other teenage girls and have
16 issues with her volleyball coach, correct?

17 A. That is a correct statement.

18 Q. Okay. So how were the basketball
19 players impacted by Jim McClellan?

20 A. I can't say that they were impacted by
21 Jim McClellan.

22 Q. And how were the parents who didn't
23 have kids on the volleyball team impacted by Jim
24 McClellan's actions?

25 A. Again, it's not about Jim McClellan.

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1 Q. Okay. Well, you identified for me the
2 safety issues that your daughter experienced and
3 why she didn't feel safe at Bishop England High
4 School and it was Jim McClellan, her volleyball
5 coach, and the fact that she was bullied by other
6 students.

7 MR. SLOTCHIVER: Object to form.

8 THE DEPONENT: That wasn't the
9 only reasons.

10 BY MR. DUKES:

11 Q. Okay. Well, tell me all of them.
12 What safety issues --

13 A. My daughter was also a student. As
14 you know, she was a student there.

15 Q. Right.

16 A. And part of her curriculum in playing
17 volleyball is they had to go into the locker
18 rooms and change.

19 Q. Right.

20 A. So because of what we now understand
21 the case to be, is that there was a window or
22 several windows that allowed for teachers or
23 coaches or whomever to look through where my
24 child was changing.

25 Q. Okay.

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1 A. And that is not safe.

2 Q. Why not?

3 A. Because if my daughter is changing and
4 she's getting into her clothes, she has to take
5 off her uniform and change into her volleyball.

6 Q. You already testified that to your
7 knowledge, your daughter was never
8 surreptitiously or covertly photographed in the
9 locker room, was she?

10 A. Excuse me?

11 Q. You've already testified that to your
12 knowledge, your daughter was never photographed
13 or videoed while she was changing clothes in the
14 locker room, correct?

15 MR. SLOTCHIVER: Object to the
16 form.

17 THE DEPONENT: Covertly
18 photographed?

19 BY MR. DUKES:

20 Q. Yes.

21 A. I -- how would I absolutely,
22 positively, unequivocally know that she's been
23 photographed?

24 Q. You've never been told that she was
25 photographed? Nobody's ever provided you with a

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1 photograph taken of your daughter while she was
2 taking -- changing her clothes?

3 A. She changed in the locker room in
4 which I'm to understand now, given what I've read
5 about and the full knowledge of what I
6 understand, was that she changed in the very
7 locker room that had a window there.

8 Q. Okay.

9 A. That was able to be viewed, not only
10 by coaches and staff, but other people as they're
11 walking through the hallways.

12 Q. But you've never been in those
13 hallways?

14 A. I've been in the hallways.

15 Q. Okay. Have you ever looked through
16 the window in the coaches' office?

17 A. No, sir.

18 Q. You understand that windows in the
19 coaches' offices from the -- in the door, are a
20 safety mechanism, just as the windows --

21 MR. RICHTER: I'm sorry. I
22 couldn't understand.

23 BY MR. DUKES:

24 Q. The windows in the door are a safety
25 precaution, correct?

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1 A. I don't know how you classify windows
2 in a door as a safety precaution.

3 Q. Do you know who designed Bishop
4 England High School?

5 A. No.

6 Q. Who decided to put the windows in the
7 locker room and why?

8 A. I do not.

9 Q. Are you aware of any other high
10 schools just in the tri-county area that have
11 windows in the locker rooms?

12 A. Again, this has nothing -- the answer
13 is no.

14 Q. So you can't tell me how you believe
15 other parents were injured by some conduct at
16 Bishop England, correct?

17 A. No, you'd have to ask those other
18 parents.

19 Q. What do you understand your duties as
20 a class representative to be?

21 A. I've discussed that with my attorney,
22 so I can't answer that.

23 MR. SLOTCHIVER: What was the
24 question, again, Rich?

25 MR. DUKES: What do you

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1 understand your duties as a class
2 representative are?

3 MR. SLOTCHIVER: You can answer
4 to the extent that you can. It's not a
5 privileged communication. So if you
6 understand your duties, please tell him.
7 I'm not instructing you not to answer.

8 THE DEPONENT: Okay. As I
9 understand it, I'm bringing forth this
10 lawsuit because I had an expectation that
11 Bishop England supplied me with or provided
12 my daughter with education in a safe
13 environment and that's not the case, so I
14 brought that forth to basically say I've got
15 an issue with it. That's my understanding.

16 BY MR. DUKES:

17 Q. Do you understand that you are now
18 required to put the interests of the other class
19 members, the people you seek to represent, ahead
20 of your own interests?

21 A. Do I understand that?

22 Q. Yeah.

23 A. Is that a condition? Does that --
24 help me understand what that means.

25 Q. Well, for example, you could not

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1 settle your case without notifying everybody in
2 the class that you were doing it.

3 A. Okay.

4 Q. And they could come in and complain
5 about it.

6 A. Okay.

7 Q. Do you understand what a fiduciary
8 duty is?

9 A. Please describe that for me.

10 Q. Well, it's a duty to put other peoples
11 interests ahead of your own?

12 A. Okay.

13 Q. And you understand you have to do that
14 with your -- with the class you are purporting to
15 represent?

16 A. If that's the way you're defining it.

17 Q. Do you understand what's required of
18 you in this case as a class representative?

19 A. Please go ahead and tell me.

20 Q. Well, if all of your lawyers were to
21 be killed in a tragic hot air balloon accident
22 and the very idea of these three guys and Carl
23 Solomon in the basket of a hot air balloon is
24 somewhat amusing to me, but if they were all
25 suddenly killed in a horrible hot air balloon

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1 accident, you'd be required to continue plowing
2 ahead with this case. You couldn't just drop it.

3 A. Okay.

4 Q. Do you have the financial wherewithal
5 to do that?

6 A. Yes.

7 Q. Okay. If your attorneys could no
8 longer pay the expenses, whether it's expert
9 witnesses or for discovery or court costs or
10 court reporters, could you pay those?

11 A. I believe that's client/attorney
12 privilege.

13 Q. In my scenario your attorneys are
14 dead. (Indicating). You would have to pay those
15 expenses going forward?

16 A. Okay.

17 Q. And you could do that? Did you read
18 the complaints before you -- the complaint before
19 you filed them?

20 A. Yes.

21 Q. Okay. Attached to the complaint is a
22 document that is -- top of it says the
23 instruction, but it's the Latin term for it is
24 Crimens Sollisolicitions. Are you familiar with
25 that document?

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1 A. You can show it to me.

2 Q. While I'm looking for it, you
3 understand that the windows looking into the
4 locker room had blinds on them, right?

5 A. I understand that.

6 Q. And that those blinds were closed?

7 A. No, sir.

8 Q. Do you have any information indicating
9 when the blinds were open?

10 A. I do not.

11 Q. I can't seem to find that document. I
12 apologize. Do you know anything about this
13 document called the instruction?

14 A. Again, you'd have to show it to me.

15 Q. Okay. What was your input in deciding
16 what claims to pursue on behalf of a class?

17 A. Again, that's client/attorney
18 privilege.

19 Q. You're refusing to answer my question?

20 MR. SLOTCHIVER: He can answer
21 to the extent -- I'm not gonna instruct him
22 not to answer. To the extent that he knows
23 the answer, he can answer.

24 BY MR. DUKES:

25 Q. Okay. Do you know what claims you're

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1 pursuing?

2 A. Conversations I've had with my
3 attorneys.

4 MR. SLOTCHIVER: You can answer
5 to the extent that you know.

6 THE DEPONENT: Yes.

7 BY MR. DUKES:

8 Q. Okay. What claims are those?

9 A. To get my money back.

10 Q. Okay.

11 A. Plus whatever damages there are.

12 Q. Well, what damages have you sustained?

13 A. Again, client/attorney privilege.

14 Q. So you can't -- you won't identify how
15 you've been damaged?

16 A. At this time, it's client/attorney
17 privilege.

18 MR. SLOTCHIVER: To the extent
19 that he can answer the question, he can
20 answer the question.

21 BY MR. DUKES:

22 Q. Are you gonna answer my question?

23 A. No, sir.

24 Q. All right.

25 MR. SLOTCHIVER: Hold on. I'm

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1 gonna instruct him. To the extent that you
2 can answer the question about your damages,
3 what you understand, I'm going to ask you to
4 answer them.

5 THE DEPONENT: Okay. My refund
6 of the money that I've paid.

7 BY MR. DUKES:

8 Q. Uh-huh.

9 A. Plus what I would consider damages to
10 the emotional duress that was caused not only on
11 my daughter, but myself and my wife.

12 Q. Okay. What emotional duress have you
13 experienced?

14 A. As a father, very difficult to even
15 comprehend that a school that ensured you of the
16 safe environment, would allow for adults to
17 continuously, throughout the years, look into a
18 locker room.

19 Q. Do you have anybody -- any evidence
20 that anyone other than Jeffrey Scofield looked
21 into those locker rooms?

22 A. Do I personally?

23 Q. Yes.

24 A. I do not.

25 Q. What emotional duress has your

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1 daughter experienced?

2 A. May I go back?

3 Q. Yes.

4 A. Jim McClellan was in the locker rooms.

5 Q. In the girls locker room?

6 A. And had stated -- excuse me, in the
7 office and had stated that he also was looking
8 through those windows.

9 Q. When did he say that?

10 A. Last week.

11 Q. At his deposition?

12 A. Yes, sir.

13 Q. Are you aware that the testimony in
14 this case is that those windows were installed as
15 a safety mechanism to ensure student safety?

16 A. I was made aware of that.

17 Q. Okay. And you'll agree with me that
18 the school should take steps to prevent fights or
19 smoking or bullying or misconduct in the locker
20 rooms while the students are in there, right?

21 A. I believe that that's what a school
22 should do.

23 Q. Okay. How many times have you
24 communicated with Larry Richter?

25 MR. SLOTCHIVER: That's an

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1 attorney/client communication.

2 THE DEPONENT: Correct. Excuse
3 me, that is an attorney/client privilege.

4 BY MR. DUKES:

5 Q. Okay. Have you ever communicated with
6 Carl Solomon?

7 MR. SLOTCHIVER: Same thing.
8 You're asking him for --

9 MR. DUKES: I'm asking how many
10 times, not the content. I don't want to
11 know what you talked about.

12 THE DEPONENT: That is an
13 attorney/client privilege.

14 BY MR. DUKES:

15 Q. You believe that?

16 A. I do.

17 Q. Okay. How about with Mr. Slotchiver?

18 A. Again, attorney/client privilege.

19 Q. Mr. Halversen?

20 A. Attorney/client privilege.

21 Q. Are you aware of any other parents or
22 student who have talked with these lawyers about
23 suing Bishop England?

24 A. I am not.

25 Q. Why do you think you can fairly and

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1 adequately represent the interests of a thousand
2 or so other people who have paid tuition at
3 Bishop England?

4 A. Because I believe what was done to my
5 daughter and what they allowed to continue to
6 have happen at school.

7 Q. Are you aware of anybody who paid
8 tuition to Bishop England who thinks you're just
9 wrong?

10 A. Okay.

11 MR. SLOTCHIVER: Rich, if I --

12 BY MR. DUKES:

13 Q. Are you aware of anyone?

14 A. No.

15 MR. SLOTCHIVER: If I may, I
16 want to go back to the question you asked a
17 minute ago. You asked him how many times he
18 communicated with the different counsel.

19 MR. DUKES: Uh-huh.

20 MR. SLOTCHIVER: I'm okay with
21 him answering that question. I was to ask
22 him to go ahead and answer the question as
23 it pertains to this case.

24 BY MR. DUKES:

25 Q. Okay. So how many times? I'm not

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1 asking about the content of your discussions.

2 A. Uh-huh.

3 Q. How many times have you talked with
4 Larry Richter?

5 A. Several.

6 MR. SLOTCHIVER: And this is
7 regarding this case?

8 BY MR. DUKES:

9 Q. Regarding this case.

10 A. Several.

11 Q. More than ten, more than 15?

12 A. More than ten.

13 Q. How about Carl Solomon?

14 A. Once.

15 Q. And just about this case, Dan
16 Slotchiver? I know he's represented you in other
17 cases.

18 A. Same. Not once. More than ten.

19 Q. What about Brent Halversen?

20 A. Three.

21 Q. How many times have you talked to Anna
22 Richter?

23 A. More than ten.

24 Q. How many times have you talked to
25 Dan's brother, Steve?

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1 A. About this case?

2 Q. Yeah.

3 A. None.

4 Q. None? Okay. Did you go to the
5 lawyers with an interest in filing the suit?

6 MR. SLOTCHIVER: I don't want to
7 interrupt, but I'm not sure how that doesn't
8 invade the attorney/client privilege.
9 Communications we've had. So I've opened it
10 to how many times he's talked to us, but
11 you're asking now about the communication.

12 BY MR. DUKES:

13 Q. Okay. For yourself, what do you want
14 out of this lawsuit?

15 A. Resolution.

16 Q. And what resolution do you want?

17 A. For those who committed what I would
18 say is egregious, to face whatever penalties, if
19 you will, and then for the school to provide me
20 with financial compensation for my tuition plus
21 what I would think is my duress and my family's
22 duress.

23 Q. Okay. Have you had to see a
24 psychiatrist or psychologist about this duress?

25 A. No.

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1 Q. Has your daughter had to see a
2 psychiatrist?

3 MR. SLOTCHIVER: She's not
4 involved in this case.

5 MR. DUKES: He just claimed that
6 his damages were because of the duress his
7 daughter has experienced.

8 MR. SLOTCHIVER: The only
9 damages he's claiming today in his capacity
10 is for himself.

11 MR. DUKES: Okay. You're
12 instructing him not to answer that question?

13 MR. SLOTCHIVER: Regarding his
14 daughter?

15 MR. DUKES: Yes.

16 MR. SLOTCHIVER: Yes.

17 BY MR. DUKES:

18 Q. Are you gonna follow your attorney's
19 instruction?

20 A. Yes.

21 Q. All right. What parents were aware of
22 the four-foot windows in the locker rooms?

23 A. I can't answer that question.

24 Q. You don't know?

25 A. No, sir.

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1 Q. Do you know what students saw the
2 windows and knew they were there?

3 A. No, sir.

4 Q. Have you ever been accused of sexual
5 harassment or sexual abuse?

6 A. No, sir.

7 Q. By anyone?

8 A. No, sir.

9 Q. What members of the class you purport
10 to represent had students who entered Bishop
11 England in their junior year?

12 A. I do not know.

13 Q. Or after their sophomore?

14 A. I do not know.

15 Q. You understand that physical education
16 is required of sophomores, right?

17 A. I do not know.

18 Q. Are you aware of any class -- members
19 of your purported class who received tuition
20 assistance or scholarships?

21 A. I do not know.

22 Q. Do you know of anyone who didn't pay
23 tuition?

24 A. I do not know.

25 Q. Are you aware of any parents whose

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1 children did not change clothes in the locker
2 rooms at all?

3 A. No, I do not know.

4 MR. RICHTER: Y'all know that
5 don't you? I think we've had written
6 discovery about some of that. I'm not sure
7 what the result was.

8 THE DEPONENT: May I ask, go
9 back for a second?

10 MR. DUKES: Huh.

11 THE DEPONENT: You mentioned
12 something, may I go back?

13 MR. DUKES: Sure.

14 THE DEPONENT: You mentioned
15 something, physical education, yes, my
16 daughter participated in physical education
17 and that also was a time that she was in the
18 locker room.

19 BY MR. DUKES:

20 Q. But are you aware of anybody whose
21 children did not?

22 A. I am not.

23 MR. DUKES: Since your attorneys
24 have said that the deposition is limited to
25 issues regarding class certification, I

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1 think I'm done, so they may want to ask you
2 some questions.

3 MR. RICHTER: Let's take a break
4 before.

5 (Whereupon, there was a short
6 break in the proceedings.)

7 E-X-A-M-I-N-A-T-I-O-N

8 BY MR. SLOTCHIVER:

9 Q. Dr. Nestler, I'd like to ask you a few
10 follow-up questions to get a little more
11 clarity --

12 A. Sure.

13 Q. -- about your testimony. You were
14 asked by Mr. Dukes about the interactions in the
15 locker room that your daughter -- or that you're
16 aware of that have affected the basis for your
17 filing this claim.

18 A. Uh-huh.

19 Q. And you had talked about the fact that
20 your daughter would have gone into the locker
21 room as result of her involvement as a volleyball
22 player?

23 A. And physical education.

24 Q. And then you talked about P.E.
25 afterwards, correct?

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1 A. Uh-huh.

2 Q. And is it your understanding that the
3 locker rooms were also a very large integral part
4 of the school? They would have been used by all
5 students?

6 A. Absolutely.

7 Q. That would have any kind of sports or
8 P.E. requirements?

9 A. Yes.

10 Q. And would those locker rooms also have
11 been used by other schools that would come for
12 the purposes of playing sports or using the
13 facilities at the school?

14 A. Yes.

15 Q. You talked about the fact that you, as
16 the class representative, are aware of the fact
17 that the locker rooms, all of them, I believe,
18 had windows in them, correct?

19 A. Yes.

20 Q. And is it your understanding those
21 windows were approximately four foot by four
22 feet?

23 A. Yes.

24 Q. You've seen photographs of the
25 windows?

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1 A. Yes.

2 Q. You aware of the fact that the windows
3 were desk height?

4 A. Yes, sir.

5 Q. So that someone sitting at a desk such
6 as, I believe the one you would have seen,
7 correct me if I'm wrong, would have been
8 Mr. Rooney's (ph) office window?

9 A. Yes.

10 Q. And it would be effectuated so he
11 could sit at his desk and look straight ahead and
12 see the window?

13 A. Correct.

14 Q. I believe you testified there were
15 blinds, that you're aware of the fact that there
16 were blinds on the window?

17 A. Yes.

18 Q. And you're familiar with the -- with
19 -- Mr. Dukes asked you about the architecture
20 firm. Are you familiar that -- with the fact
21 that LS3P, the architectural firm, admitted that
22 the windows were -- that the windows were in the
23 locker room, looking from the coaches' office
24 into the locker room where you could see the
25 students?

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1 A. Yes, sir. I believe so.

2 Q. When you contracted with Bishop
3 England -- well, when all parents contract with
4 Bishop England, as the class rep., are you aware
5 of any parent who contracted with LS3P in making
6 their decision to go to Bishop England?

7 A. No.

8 Q. Are you familiar with the testimony
9 that LS3P admitted that the way the windows were
10 situated, the type of windows and blinds that
11 were used on the windows, afforded the equivalent
12 of a peep hole into the locker room?

13 A. Yeah.

14 MR. DUKES: Object to the form.

15 That's not what they said.

16 BY MR. SLOTCHIVER:

17 Q. And are you familiar with the fact
18 that the type of blinds afforded the ability of
19 people in the coaches' office, who ever that
20 might be, to look at the students in the locker
21 room without the students knowing that they're
22 being looked at?

23 MR. DUKES: Object to form.

24 THE DEPONENT: Yes.

25 BY MR. SLOTCHIVER:

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1 Q. Mr. Dukes asked you a question about
2 what knowledge you had. I'd like to read to you
3 a paragraph from the answer to the lawsuit that
4 you filed. It's paragraph 84. The Diocese
5 admits -- "The Diocese admits only that Bishop
6 England High School charges tuition for the
7 educational services it provides to students.
8 The Diocese and Bishop England High School strive
9 to provide its students with an excellent
10 education and to support concepts of Catholic
11 teaching on morality and respect for all
12 individuals."

13 A. Uh-huh.

14 Q. Do you believe that you or any of the
15 other punitive class members were provided with a
16 moral environment wherein the school was built
17 and utilized in a way where the coaches or other
18 staff members or people in the coaches' office
19 could look at the students while they were in
20 various stages of dress or undress, including
21 nudity?

22 MR. DUKES: Object to the form.

23 THE DEPONENT: Could you repeat
24 that question again?

25 MR. SLOTCHIVER: Would you

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1 please repeat it?

2 THE DEPONENT: Sorry, ma'am.

3 MR. DUKES: Yeah, because we
4 know you couldn't repeat it. It went on for
5 a paragraph and a half.

6 MR. SLOTCHIVER: No comment.

7 (Whereupon, there was a read
8 back in the proceedings.)

9 THE DEPONENT: All right.
10 That's a lot. One more time, please.

11 MR. DUKES: And I'll object to
12 the form again.

13 THE DEPONENT: One more time,
14 please. I'm sorry.

15 BY MR. SLOTCHIVER:

16 Q. Well, I'll ask it differently.
17 Relying on what the school represented they would
18 provide to you, which was a moral, safe,
19 respectable environment, do you believe that you
20 had -- that you got the bargain of what you paid
21 for?

22 A. No.

23 MR. DUKES: Object to the form.

24 BY MR. SLOTCHIVER:

25 Q. Let me finish the question.

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1 A. Sorry.

2 Q. As it relates to not the education?

3 A. Correct.

4 Q. The teaching part?

5 A. Correct.

6 Q. But as it relates to the environment
7 in so much as there was a window that allowed
8 various people, who ever was in the coaches'
9 office, to look at the students in various states
10 of dress or undress?

11 MR. DUKES: Object to the form.

12 THE DEPONENT: Right. I do not
13 believe that I was provided with an
14 environment that was consistent with the way
15 they spoke to us when we first looked at the
16 school.

17 BY MR. SLOTCHIVER:

18 Q. And I'm not talking about you, I'm
19 talking about everybody.

20 A. Everybody.

21 Q. All parents?

22 A. All parents.

23 Q. Do you believe that having a window in
24 the locker room allowing people in the coaches'
25 office to look at the children in various stages

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1 of dress or undress, is that a safe
2 environment?

3 A. No.

4 MR. DUKES: Object to form.

5 BY MR. SLOTCHIVER:

6 Q. Is that a moral environment?

7 A. No.

8 MR. DUKES: Object to form.

9 BY MR. SLOTCHIVER:

10 Q. Is that a dignified environment?

11 A. No.

12 MR. DUKES: Objection to form.

13 BY MR. SLOTCHIVER:

14 Q. Is that a respectful environment to
15 the students?

16 MR. DUKES: Object to form.

17 THE DEPONENT: Absolutely not.

18 BY MR. SLOTCHIVER:

19 Q. Does that provide privacy to the
20 students?

21 A. It does not.

22 MR. DUKES: Object to the form.

23 BY MR. SLOTCHIVER:

24 Q. Mr. Dukes asked you if you thought
25 that a school had a duty to create a safe

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1 environment?

2 A. Yes.

3 Q. And I believe the words he used were
4 as it related to bullying or smoking.

5 A. The school has a responsibility to
6 provide a safe environment.

7 Q. On behalf of the parents, do you
8 believe that providing a viewing window into the
9 locker room where the students could be seen and
10 were seen without knowing that they were seen, is
11 that a safe environment?

12 MR. DUKES: Object to the form.

13 THE DEPONENT: It's not only not
14 safe, it's reprehensible behavior. It's
15 disgusting, it's despicable, and it goes
16 against the grain of what we were told, what
17 the teachings, and morality, and the policy
18 of the Catholic church.

19 BY MR. SLOTCHIVER:

20 Q. And when you say what you were told,
21 are you referring to yourself or are you
22 referring to every single person that went to
23 that school?

24 A. Every single person to that school
25 were told the same thing. When we interviewed

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1 with the school, that's exactly what they came
2 out with. Which is this is the conduct, this is
3 what you are to expect.

4 Q. Did anybody ever advise or are you
5 aware of the school ever advising yourself or
6 anybody about the fact that the school would be
7 monitoring the children in the locker room
8 through windows without the children knowing that
9 they're being monitored?

10 A. Never.

11 MR. DUKES: Object to the form.

12 BY MR. SLOTCHIVER:

13 Q. Are you aware of any signs in the
14 locker room warning the students that you may be
15 monitored and looked at in various states of
16 dress or undress?

17 A. No.

18 Q. Let me finish.

19 A. Sorry.

20 Q. Without any notes?

21 MR. DUKES: Object to the form.

22 THE DEPONENT: No, I was not
23 aware of any signs in the locker room or
24 anywhere for that fact of the matter, in the
25 school.

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1 BY MR. SLOTCHIVER:

2 Q. So speaking on behalf of the parents,
3 is it your understanding that no parents were
4 given any notice of the fact that there would be
5 viewing of the children in the locker room?

6 MR. DUKES: Object to the form.

7 THE DEPONENT: Speaking on
8 behalf of all the parents, that is correct.

9 May I trouble you for a cup of
10 water?

11 MR. DUKES: Sure.

12 THE DEPONENT: Thanks.

13 BY MR. SLOTCHIVER:

14 Q. I'm gonna read to you another part of
15 the answer provided to us by the Diocese and
16 Bishop England High School. "The Diocese and
17 Bishop England High School strive to provide a
18 safe, moral, and nurturing educational
19 environment based on the teachings of the
20 Catholic church."

21 On behalf of the parents, the tuition
22 paying class, are you aware that any teachings of
23 the Catholic church that advocates or supports
24 looking at young children nude --

25 MR. DUKES: Object to the form.

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1 BY MR. SLOTCHIVER:

2 Q. -- or in various states of dress in a
3 locker room without advising them that you're
4 going to look at them?

5 A. No, sir.

6 MR. DUKES: Object to the form.

7 BY MR. SLOTCHIVER:

8 Q. Paragraph 8, "The Diocese admits only
9 that Bishop England was designed with the safety
10 of students and visitors in mind and that the
11 locker room windows were a safety feature to
12 allow adults to monitor the changing area for
13 bullying, fighting, or other misbehavior."

14 Are you aware of how many incidents we
15 have been advised of by Bishop England High
16 School of safety events that occurred in the
17 locker room since the inception of the Daniel
18 Island campus of the Bishop England school?

19 MR. DUKES: Object to the form.

20 THE DEPONENT: Yes.

21 BY MR. SLOTCHIVER:

22 Q. How many are there?

23 A. Three.

24 Q. On behalf of the parents and the
25 tuition paying class, do you believe that it's

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1 reasonable -- do you believe that the requirement
2 to provide safety must be reasonable in nature?

3 MR. DUKES: Object to the form.

4 THE DEPONENT: I'm sorry, Dan,
5 repeat, excuse me.

6 BY MR. SLOTCHIVER:

7 Q. On behalf of the tuition paying class,
8 do you believe that any safety features put in
9 place must be reasonable?

10 MR. DUKES: Object to the form.

11 THE DEPONENT: Yes.

12 MR. DUKES: What does that have
13 to do with class certification?

14 MR. RICHTER: What was the
15 question? I couldn't --

16 MR. SLOTCHIVER: What does it
17 have to do with class certification?

18 MR. DUKES: Yes.

19 MR. SLOTCHIVER: Class
20 certification, he's the parent, he's got to
21 support the view of the parents in light of
22 what was presented to them, which was
23 windows looking into the locker room,
24 looking at the children that are not safe.

25 MR. DUKES: Okay. It goes to

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1 the merits, Dan, not to the issues of --

2 MR. SLOTCHIVER: Of all -- but
3 that's why I asked of all the parents who
4 were similarly situated in so much they had
5 the right to rely upon safety, so I believe
6 it does go to that issue.

7 MR. DUKES: I disagree with you.

8 MR. SLOTCHIVER: Okay.

9 MR. RICHTER: Well, the judge
10 will decide.

11 BY MR. SLOTCHIVER:

12 Q. Had you been told that people at the
13 Bishop England High School who had access into
14 the coaches' office, who ever they were --

15 A. Uh-huh.

16 Q. -- would have the opportunity and
17 would, in fact, view students in the locker room
18 in various states of dress --

19 A. No.

20 Q. -- all the way to nudity, would you
21 have sent your child to that school?

22 A. Absolutely not.

23 Q. Would any of the parents that you are
24 standing to support in this tuition paying class,
25 have sent their children to that school if they

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1 had known --

2 MR. DUKES: Object to the form.

3 BY MR. SLOTCHIVER:

4 Q. -- that their children would be
5 objectified or viewed?

6 A. One hundred percent not.

7 MR. DUKES: Object to the form.

8 BY MR. SLOTCHIVER:

9 Q. And would you have ever paid a dollar
10 to have that invasion of privacy extended to your
11 child?

12 A. Unequivocally not.

13 MR. DUKES: Object to the form.

14 BY MR. SLOTCHIVER:

15 Q. Were there other options that were
16 available for high schools where you would not
17 have had to pay money and put your child in an
18 environment where her privacy was invaded?

19 MR. DUKES: Object to the form.

20 THE DEPONENT: Yes.

21 MR. SLOTCHIVER: Just give us
22 one more moment, okay. See if we can wrap
23 this up.

24 (Whereupon, there was a short
25 break in the proceedings.)

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1 MR. SLOTCHIVER: I've got no
2 further questions to ask. I'm happy if you
3 want to spend five minutes and go through
4 the six or seven items we objected to, to
5 see if we can work them out. But if not, we
6 can just file a motion and read the
7 transcript and see if we need to reconvene.

8 MR. DUKES: It would probably be
9 easier just to file a motion and go from the
10 transcript.

11 MR. SLOTCHIVER: I haven't
12 looked at the rule. Maybe you know it off
13 hand. Is it five business days or is it
14 five days?

15 MR. DUKES: Deadlines, I always
16 go to look it up. I've learned not to trust
17 my memory on that, so I always go look it
18 up.

19 MR. SLOTCHIVER: I was gonna see
20 if we could agree to it, I'd agree to it,
21 but if not, with the federal court, we can't
22 alter it anyhow. Yeah. Thank you. I've
23 got nothing further.

24 MR. DUKES: Thank you very much.

25 MR. SLOTCHIVER: You have the

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1 right to read and sign. I generally tell
2 people that are answering simplistic
3 questions to waive it, but because of some
4 of the terminology you used throughout your
5 deposition, I would say that you want to
6 read and sign.

7 THE DEPONENT: Okay.

8 MR. SLOTCHIVER: Okay.

9 (This deposition concluded at 12:05 a.m.)

10

11 (Signature reserved.)

12

13

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Nicole D. White



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1 C E R T I F I C A T E

2

3 STATE OF SOUTH CAROLINA)

4 COUNTY OF BERKELEY)

5

6 I, Nicole D. White, Certified Court
7 Reporter and Notary Public, State of South
8 Carolina at Large, certify that I was authorized
9 to and did stenographically report the foregoing
10 deposition of Gary Nestler; and that the
11 transcript is a true record of the testimony given
12 by the witness, and was sworn as such.

13 I further certify that I am not a
14 relative, employee, attorney or counsel of any of
15 the parties, nor am I a relative or employee of
16 any of the parties' attorney or counsel connected
17 with the action, nor am I financially interested
18 in the action.

19 WITNESS MY HAND AND OFFICIAL SEAL this
20 1st day of October 2021.

21

22

Nicole D. White
Notary Public in and for the
State of South Carolina

24

25 My Commission expires September 8, 2027

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1 E R R A T A S H E E T

2

3 RE: Nestler, et al -vs- The Bishop of Charleston,
4 a Corporation Sole, Bishop England High School, et
5 al

6

7 DEPOSITION OF: Gary Nestler

8

9 Please read this original deposition with
10 care, and if you find any corrections or changes
11 you wish made, list them by page and line number
12 below. DO NOT WRITE IN THE DEPOSITION ITSELF.

13 Return the deposition to this office after it is
14 signed. We would appreciate your prompt attention
15 to this matter.

16 To assist you in making any such
17 corrections, please use the form below. If
18 supplemental or additional pages are necessary,
19 please furnish same and attach them to this errata
20 sheet.

21 Page _____ Line _____ Should read: _____

22

23 Reason for change: _____

24 Page _____ Line _____ Should read: _____

25

Reason for change: _____

Page _____ Line _____ Should read: _____

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1 Reason for change: _____

2 Page _____ Line _____ Should read: _____

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4 Reason for change: _____

5 Page _____ Line _____ Should read: _____

6 _____

7 Reason for change: _____

8 Page _____ Line _____ Should read: _____

9 _____

10 Reason for change: _____

11 Page _____ Line _____ Should read: _____

12 _____

13 Reason for change: _____

14 _____

15 _____

16 Signature

17 _____

18 SUBSCRIBED and SWORN TO before me this

19 _____ day of _____ 2021.

20 _____

21 _____

22 NOTARY PUBLIC

23 _____

24 My Commission expires: _____

25 _____

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EXHIBIT 21

**United States District Court
District of South Carolina
Charleston Division**

Gary Nestler,)	C/A: 2-21-cv-00613-RMG
Viewed Student Female 200,)	
Viewed Student Male 300,)	
on behalf of themselves and all others)	
similarly situated,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
)	
)	
The Bishop of Charleston, a Corporation)	
Sole, Bishop England High School,)	
Tortfeasors 1-10, The Bishop of the Diocese)	
of Charleston, in his official capacity, and)	
Robert Guglielmone, individually,)	
)	
Defendants.)	
)	

STATEMENT OF QUALIFICATIONS OF PROPOSED CLASS COUNSEL

1. LAWRENCE E. RICHTER, JR.

He is an attorney for the Plaintiffs in the above referenced captioned case. He was born in Charleston, South Carolina on November 2, 1946 into the Roman Catholic Diocese of Charleston, received twelve years of parochial school education within the Charleston area, and graduated from Bishop England High School in 1964. He did his undergraduate work and obtained an AB in English from the University of North Carolina at Chapel Hill in 1968. Thereafter he entered the University of South Carolina School of Law in the fall of 1968 and received his juris doctorate from that institution in June of 1971. He was admitted to the South Carolina Bar on the 21st day of September 1971 and has been a member in good standing thereof since that date. He is licensed to practice in all South Carolina trial level and appellate courts, as well as the United States District Court of South Carolina, and the United States Fourth Circuit Court of Appeals, and has been admitted also to multiple federal district and appellate courts around the country on a *pro hac vice* basis. In addition, he is a member of the United States Supreme Court Bar.

Throughout his fifty years of practice he has functioned in various capacities. In the private practice of law he has been almost exclusively a trial lawyer representing plaintiffs in complex litigation. He is a retired South Carolina circuit court judge and has resumed private practice until he fully retires. He has a small plaintiffs' firm and handle a small number of cases.

He has spent a substantial portion of his working life in public service including serving as a Municipal Judge, Family Court Judge, Circuit Court Judge, and has sat on the South Carolina Supreme Court as Acting Associate Justice on several occasions. He was appointed by the Federal Judiciary as a member of the plaintiffs' steering committee for the U.S. Air Charlotte crash in the 1990s. In fact, he has served in all three branches of government as a member of the South Carolina Senate, the judicial branch as set forth above, and as Chairman of the Medical Examiner Commission and a member of the Charleston Aviation Authority in the executive branch.

He is rated AV by his peers through the Martindale Hubbell rating service and has no record whatsoever of any sanction in any capacity throughout his entire career. He has much experience litigating against the Diocese of Charleston, a defendant in the case at bar, but not only that Diocese. In fact, he has conducted litigation inside and outside of South Carolina in various states. Specifically, he has been involved in a number of class action matters ranging from representing individual claimants to seeking the certification of classes. He is firmly committed to battling perpetrators of sexual abuse upon children, particularly, and has done so in many cases. The Diocesan Defendants herein are well familiar with his abilities as an advocate for these victims and have virtually uniformly sought to keep him out of cases against this Diocese. One previous class action matter was successfully concluded against some or all of the Diocesan Defendants during the approximate timeframe of 2007 to 2009.

2. CARL L. SOLOMON

He is an attorney for the Plaintiffs in the above captioned case. He was born in Sumter, South Carolina on August 22, 1969. He did his undergraduate work and obtained a B.S. in Economics from Florida State University in Tallahassee in 1991. Thereafter he entered the University of South Carolina in Columbia, South Carolina and received his J.D. from that institution in 1994. He was admitted to the South Carolina Bar on the 3rd day of January 1995 and has been a member in good standing thereof since that date. He is licensed to practice in all South Carolina trial level and appellate courts, as well as the United States District Court of South Carolina, and the United States Fourth Circuit Court of Appeals. He is currently involved in multi district litigation matters (In Re: National Prescription Opiate Litigation, In Re: Juul Labs, Inc., Marketing, Sales Practices, and Products Liability Litigation, In Re: Aqueous Film-Forming Foams Products Liability Litigation) in multiple federal district courts around the country.

Throughout his years of practice, he has functioned in various capacities. In the private practice of law, he has been almost exclusively a trial lawyer representing plaintiffs in complex litigation. He has served the legal community in many capacities

including President of the South Carolina Bar (2010–2011); Board of Governor’s South Carolina Bar (2006 - 2012); Pro Bono Criminal Domestic Violence Prosecutor for the South Carolina Attorney General’s Office; City of Columbia Municipal Judge (2011 –2015); and National College of Advocacy Board of Directors (Co-Chair 2019-2021).

He was appointed as a member of the plaintiffs’ steering/executive committee for In Re: Graniteville Train Derailment and In Re: Aqueous Film-Forming Foams Products Liability Litigation. He has also been involved in several high-profile matters in South Carolina including Johnson v. Collins (Video Poker Litigation) and the Charleston Sofa Super Store Fire Litigation. He was recently appointed Interim Co-Lead Counsel in consolidated actions Doe v. Roper St. Francis Healthcare and Tortfeasors 1-10, 2021-CP1000245 matter, the Doe #2 v. Roper St. Francis Healthcare and Tortfeasors 1-10, 2021-CP1001668 matter, and the Frederick et al. v. Roper St. Francis Healthcare, 2021-CP-10-00756 matter with the Prevost v. Roper St. Francis Healthcare, 2021-CP1001754. All pending in the Court of Common Pleas, Charleston County.

He is rated AV by his peers through the Martindale Hubbell and is listed in Super Lawyers, Multi-Million Dollar Advocates and Best Lawyers in America, among others.

3. DANIEL S. SLOTCHIVER

He is an attorney for the Plaintiffs in the above referenced captioned case. He was born in Charleston, South Carolina on December 2, 1964. After graduation from Porter Gaud High School in Charleston SC, he did his undergraduate work and obtained a Bachelor of Arts degree from Tulane University in 1987. Thereafter he entered the Whittier College School of Law in the fall of 1987 and received his Juris Doctorate from that institution in May of 1990. He was admitted to the South Carolina Bar November of 1990 and has been a member in good standing thereof since that date. He is rated AV by his peers through the Martindale Hubbell rating service and has no record whatsoever of any sanction in any capacity throughout his entire career. He is licensed to practice in all South Carolina trial level Courts, as well as the United States District Court of South Carolina, and has been admitted outside of South Carolina on a pro hac vice basis.

Throughout his thirty-one years of practice he has functioned in various capacities. In the private practice of law he has been almost exclusively a trial lawyer representing plaintiffs in litigation. He has and/or in involved in a number of class action matters ranging from representing individual claimants to seeking class certification, including a resolved construction matter and a pending data breach class action for which he is included as interim co-lead counsel. He is also a former Prosecutor for the Isle of Palms municipal court and a Partner in Slotchiver & Slotchiver LLP

4. STEPHEN M. SLOTCHIVER

He is an attorney for the Plaintiffs in the above referenced captioned case. He was born in Charleston, South Carolina on March 14, 1967. He graduated from Porter Gaud High School in 1985. He did his undergraduate work and obtained a Bachelor of Arts degree from University of Miami in 1989. Thereafter he entered the Whittier College School of Law in the fall of 1989 and received his Juris Doctorate from that institution in May of 1992. He was admitted to the South Carolina Bar in November of 1992, and has been a member in good standing thereof since that date. While continuing to practice law for Slotchiver & Slotchiver, LLP, he entered Villanova University Law School and received his Masters of Law in Taxation in December of 1994. He is rated AV by his peers through the Martindale Hubbell rating service and has no record whatsoever of any sanction in any capacity throughout his entire career. He is licensed to practice in all South Carolina trial level Courts, as well as the United States District Court of South Carolina.

Throughout his twenty-nine years of practice he has functioned in various capacities. In the private practice of law he has a strong emphasis in estate litigation and tax controversy matters. He is a Partner in Slotchiver & Slotchiver LLP.

5. BRENT S. HALVERSEN

He is an attorney for the Plaintiffs in the above referenced captioned case. He was born in Hagerstown, Maryland on December 14, 1974 into the Roman Catholic Archdiocese of Baltimore and thereafter received four years of parochial school education from St. Mary Catholic School, and graduated from Mercersburg Academy in 1992. He did his undergraduate work and obtained an B.A. in Philosophy from Vanderbilt University in Nashville, Tennessee in 1997. Thereafter he entered Loyola University New Orleans, Louisiana and received his J.D. from that institution in 2001. He is admitted to the South Carolina and Florida Bars and is licensed to practice in the United States District Courts for the Middle and Southern Districts of Florida and the United States District and Bankruptcy Courts of South Carolina.

Mr. Halversen began his legal career in West Palm Beach, Florida at the law firms of Broad and Cassel, Fowler White Boggs Banker and Wicker Smith O'Hara & Ford, focusing on corporate defense of tort and commercial litigation, including appellate defense of nationwide class action case matters. In 2008, Mr. Halversen relocated to Mount Pleasant, South Carolina and formed his own firm with his wife Stirling Halversen, Halversen & Halversen, LLC. Stirling Halversen presently serves as Assistant Corporation Counsel for the City of Charleston. Mr. Halversen practices primarily in business and municipal litigation and presently serves as the City Attorney for the Isle of Palms.

6. ANNA E. RICHTER

Anna E. Richter was born and raised in Mt. Pleasant, SC. She graduated from Bishop England High School and then attended the University of South Carolina where she earned a BA in Political Science and a minor in Southern Studies. After college, Anna returned home to Charleston where she attended the Charleston School of Law, graduating in 2011. After completing law school, Anna served as judicial law clerk to the Honorable Diane Shafer Goodstein in the First Judicial Circuit. She then joined the First Circuit Solicitor's Office as the sole juvenile prosecutor for Orangeburg and Calhoun counties, practicing in family court and also managing juvenile diversionary programs including Juvenile Drug Court and Arbitration.

Upon departing the Orangeburg/Calhoun office of the First Circuit Solicitor's Office, Anna then transferred to the Dorchester office of the First Circuit Solicitor's Office where she prosecuted a General Sessions docket, primarily domestic violence and special victim offenses. Anna also took on the task of prosecuting magistrate level domestic violence offenses, and ran Domestic Violence court in Dorchester County Magistrate Court. While in the First Circuit, Anna also served as second chair in the prosecution of former Speaker of the SC House of Representatives in the public corruption probe under Solicitor David Pascoe. After several years in the First Circuit, Anna joined the Ninth Circuit Solicitor's Office where she ran DV Court at the magistrate level, as well as prosecuted a General Sessions docket. She has gained substantial trial experience while at the Solicitor's offices in both the First and Ninth Circuits, and prosecuted an array of offenses ranging from misdemeanors to felonies, including Violent and Serious crimes. While in the Charleston Solicitor's Office, Anna also served as the co-facilitator for the Ninth Judicial Circuit's Domestic Violence Fatality Review Team, and was a member of the Domestic Violence Coordinating Committee.

In 2019 Anna moved into private practice, where she has gained experience in complex civil litigation. The Town of Mount Pleasant Council unanimously appointed Anna to serve a two-year term as a Judge of the Municipal Court of Mount Pleasant on December 8, 2020.

She was admitted to the South Carolina Bar in November of 2012 and is also licensed to practice in the United States District Court of South Carolina. She practices with The Richter Firm, LLC working primarily complex civil cases including child sex abuse and professional negligence claims for Plaintiffs.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

CIVIL ACTION NUMBER: 2:21-cv-613-RMG

Gary Nestler, *et al*,

Plaintiffs,

v.

The Bishop of Charleston, a Corporation
Sole, *et al*,

Defendants.

**DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION**

Defendants oppose Plaintiffs' Motion for Class Certification [Dkt. 67]. Plaintiffs have failed to establish through admissible evidence the requirements mandated pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3). As such, the motion for class certification must be denied.

STANDARD OF REVIEW

Actual, not presumed, conformance with Rule 23(a) remains indispensable, and the required rigorous analysis will entail some overlap with the merits of the plaintiff's underlying claim.¹ A court is required to consider as much of the merits as may be necessary to determine whether a putative class of plaintiffs meets the certification requirements of Rule 23.² In short, the Court may not take the allegations made in support of class certification as true. In *Wal-Mart*, the Supreme Court expressly rejected that rationale, and stated that the language relied upon by

¹ *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551-52 (2011).

² *Comcast v. Behrend*, 133 S.Ct. 1426, 1433 (2013). "A district court must definitively determine that the requirements of Rule 23 have been satisfied, even if that determination requires the court to resolve an important merits issue." *EQT Prod. Co. v. Adair*, 764 F.3d 347, (4th Cir. Va. 2014).

Plaintiffs “is the purest dictum and is contradicted by our other cases.”³ Actual, not presumed compliance with Rule 23(a) and 23(b)(3) is indispensable.⁴

BACKGROUND and LACK OF ANY ACTIONABLE CLAIMS

The Plaintiffs’ case involves entirely speculative claims of possible improper use of windows from three coaches’ offices looking into the locker areas of three locker rooms at Bishop England High School.⁵ The design drawings make clear that someone in the office could not see the showers, could not see the bathroom areas, and had a very limited view of one of the sinks outside the bathroom area.⁶ Because there is not a shred of evidence that either student-plaintiff was actually illicitly recorded changing clothes – neither is among the five boys identified by the South Carolina Attorney General’s Internet Crimes Against Children Task Force as having been surreptitiously recorded changing clothes in the locker room by Jeffrey Scofield in 2019 – Plaintiffs’ claims are entirely “what might have happened” or “what could have happened” as opposed to what did happen. As Plaintiffs’ psychiatrist described it, the situation is like driving across a bridge that later collapses and you realize you could have been killed, though you were not. She said the possibility that the student-plaintiffs could have been photographed, even though they were not, still impacts them.⁷

The United States Supreme Court held that plaintiffs in a very similar situation had no legal standing to sue in *TransUnion LLC v. Ramirez*, and used the following example:

Suppose that a woman drives home from work a quarter mile ahead of a reckless driver who is dangerously swerving across lanes. The reckless driver has exposed

³ *Wal-Mart*, 131 S. Ct. at 2552; see also *EQT Prod. Co. v. Adair*, 764 F.3d 347, 357 (4th Cir. 2014).

⁴ *EQT Prod. Co.*, 764 F.3d at 362 quoting *Gen. Tel. Co. of Sw v. Falcon*, 457 U.S.147, 160 (1982).

⁵ The student-plaintiffs allege three causes of action: Wrongful Intrusion into Private Affairs (Count I); Negligent Hiring, Supervision, and Retention (Count V); and Negligence (Count VI)

⁶ See LS3P locker room design drawing, *Exhibit 1*

⁷ *Amanda Salas deposition*, 82:11 – 84:18, *Exhibit 2*.

the woman to a risk of future harm, but the risk does not materialize and the woman makes it home safely. As counsel for TransUnion stated, that would ordinarily be cause for celebration, not a lawsuit. *Id.*, at 8. But if the reckless driver crashes into the woman's car, the situation would be different, and (assuming a cause of action) the woman could sue the driver for damages.⁸

In essence, these Plaintiffs allege that there should essentially be strict liability based on the mere existence of windows into the locker rooms regardless of whether they were used or misused at any point in the past.⁹ At a very granular level, these Plaintiffs have no actual claim for which relief may be granted, and certainly cannot represent any sort of class. They have no concrete harm that grants them standing, nor can they prove that *every* member of the class has standing.¹⁰ There is no basis for recovery for “but, I could have been killed,” or “I am afraid I might have been photographed.” These student-plaintiffs cannot present any admissible evidence that they *were* photographed or videoed by anyone.

Moreover, the design feature of a coaches' office with a window into the locker room space is quite common, and in some states, is required. Defendants' expert witnesses, Myles Glick (architect)¹¹ and Lee Runyon (requirements of school construction)¹² have opined that having windows looking in the locker room was entirely consistent with the standard of care for the construction of schools at the time Bishop England was designed and constructed.

Surveillance of the locker room and the installation of security windows in the coaches or PE teacher's office (Rooms #C121, C144, and C149), are “standard of care for architects and school districts. As architects, student safety and security are a priority. View windows provide the necessary security/supervision for locker

⁸ *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2211 (2021)

⁹ See *Male Student Deposition*, 10: 16 – 12: 3; 13:9 – 14:3; 15: 10 – 14; 16: 5 – 8; 32: 3 - 6 **Exhibit 5**; *Female Student Deposition* 7:20 – 9:19; 12:4-9; 16:10-13; 20: 15-18; 35: 8 - 16, **Exhibit 6**.

¹⁰ *TransUnion*, at 2206. In the majority opinion, Justice Kavanaugh quotes then-Judge Barrett, “Article III grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions.” *Quoting Cassilas v. Madison Ave. Assocs.* 926 F.3d 329, 332 (7th Cir. 2019).

¹¹ *Glick Report*, **Exhibit 3**.

¹² *Runyon Report*, **Exhibit 4**.

rooms in high schools in the Low Country and across the United States. The design and installation of the view windows at Bishop England High School, as shown on the architect's plans dated October 26, 1996, meets the standard of care within a high degree of architectural certainty.¹³

Lee Runyon opined:

Given the information I have independently reviewed, it is my professional conclusion that the locker room areas of Bishop England High School as originally constructed inclusive of internal office spaces with internal windows were in accord with the operational requirements of schools, consistent with best practices for student safety and supervision and in common with numerous other facilities at fellow high schools constructed in the 1990s. The design afforded staff and students the opportunity to be mutually aware of their presence for supervision and safety. It afforded the staff the ability to conduct administrative duties and class / team responsibilities while simultaneously supervising students. It provided students restroom facility in which to conduct hygiene related activities in private stalls not visible from the administrative office. The school clearly expresses in numerous ways, both written and in action, that student safety and supervision are paramount as evidenced in the Faculty Handbook and written communication for Physical Education Classes distributed by teachers to parents at the start of each academic semester. It is my professional conclusion that Bishop England High School's Locker Room Facility as originally constructed met all the required needs for student safety, supervision, and educational purposes in accordance with the school's established mission.¹⁴

Eric Aichele, the architect who designed Bishop England High School, testified that every high school he designed from the 1970s until the last high school he designed, Wando High School in 2004, contained exactly the same design feature.¹⁵ The architecture firm that designed Bishop England, LS3P, testified that such windows in the locker rooms of schools was very common and were designed for security purposes.¹⁶ There are at least fifteen schools in the Charleston,

¹³ *Glick Report*, p. 4.

¹⁴ *Runyon Report*, p. 12-13.

¹⁵ *Aichele deposition*, 38: 2 – 39: 5; 52: 2 – 4; 68: 13 – 14, 19 – 22; 96: 4 -11; 101: 25 – 102: 13; 115: 24 – 116: 11. **Exhibit 7.**

¹⁶ *LS3P 30(b)(6) deposition, session 2*, 129: 11 – 20; 136: 8 – 11; 152: 22 – 153: 8; 156: 21 – 22; 161: 25 – 162: 4, **Exhibit 11.**

Berkeley, and Dorchester District 2 school districts that have coaches' offices with windows opening to the locker rooms.¹⁷

Importantly, for an action to lie under South Carolina law based upon invasion of privacy or wrongful intrusion into private affairs, plaintiffs must be able to show that the intrusion was substantial and unreasonable enough to be legally cognizable – that there was a blatant and shocking disregard of plaintiffs' rights and serious mental injury as the result thereof.¹⁸ The determination of whether the locker room windows themselves were such a blatant and shocking disregard for the rights of students is a question of law for the court.¹⁹ A design feature that is both quite common in high schools and that meets the applicable standard of care simply cannot be a legally cognizable intrusion on private affairs.

Plaintiffs' reliance on *Brannum v. Overton County Sch. Bd.* and other public school cases is entirely misplaced.²⁰ First, *Brannum* was a 28 U.S.C. §1983 and Fourth Amendment challenge to a public middle school's installation of a video surveillance system in locker rooms and a claim of qualified immunity by school administrators. Male school administrators, acting under color of state law, had accessed videos of female students changing in the locker rooms. The Sixth Circuit held that the public school officials violated the students' Fourth Amendment right to shield their naked bodies from being seen. The Court analyzed the reasonableness of the video search under *Terry v. Ohio* and concluded the Fourth Amendment prohibited the video surveillance system

¹⁷ These are: CCSD – Burke H.S., North Charleston H.S., Wando H.S., West Ashley H.S., Stall H.S., District 4 Stadium; BCSD – Timberland H.S., Cross H.S., Goose Creek H.S., Cane Bay H.S., Fort Dorchester H.S., Stratford H.S., Hanahan H.S.; DD2 – Summerville H.S., Ashley Ridge H.S., Dubose Middle School, Oakbrook Middle School, River Oaks Middle School.

¹⁸ See *Snakenberg v. Hartford Casualty Ins. Co.* 299 S.C. 164, 171-2, 383 S.E.2d 2, 12-13 (Ct. App. 1989); citing *Meetze v. Associated Press*, 230 S.C. 330, 95 S.E.2d 606 (1956) and *Rycroft v. Gaddy*, 281 S.C. 119, 314 S.E.2d 39 (Ct. App. 1984).

¹⁹ *Meetze v. Associated Press*, *supra*.

²⁰ *Brannum v. Overton County Sch. Bd.*, 516 F.3d 489 (6th Cir. 2008).

installed (apparently after the school was built) by the public school district and videotaping students without their knowledge. However, the Court did acknowledge that “students have a less robust expectation of privacy than is afforded the general population,” and that “this expectation may be even less for student athletes in locker rooms, which the [Supreme] Court has previously observed are places not notable for the privacy they afford.”²¹

Obviously, Bishop England is not a state actor and the Fourth Amendment does not apply in any respect to the school; nor were any coaches or school officials alleged to have been acting under color of state law.²² Second, there is no evidence before the court that there was some covert videotaping system in the locker rooms that allowed males to observe girls or females to observe boys – only the existence of coaches’ offices with windows that afforded potential visual access – if the blinds were opened – to the changing area of the locker room, which *was* the standard of care for school construction.²³ In short, Plaintiff’s reliance on cases involving public schools and video surveillance systems is completely inapposite.

The Male Student attended Bishop England High School from 2012 until graduating 2016.²⁴ He said he was aware of the presence of the locker room windows while he was a student and knew that the locker room windows were present. He said he knew the coaches’ office was on the other side of the window and that he could tell when the lights were on in the office and

²¹ *Brannum v. Overton County Sch. Bd.*, 516 F.3d at 496, *quoting Veronia Sch. Dist. 47J v. Acton*, 517 U.S. 646, (1995).

²² *See e.g. U.S. v. Jacobsen*, 466 U.S. 109, 114 (1984)(where searches are conducted by private parties, whether reasonable or unreasonable, they do not violate the Fourth Amendment); *U.S. v. Jarrett*, 338 F.3d 339 (4th Cir. 2003).

²³ Both students, the principal, and the associate principal all testified that the blinds were never open. Aside from speculation and hypotheticals, there is no evidence in the record to the contrary.

²⁴ Male Student was born February 15, 1998, and turned 18 on February 15, 2016.

when a coach occupied the office.²⁵ The statutory period of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto.²⁶ The South Carolina Supreme Court has interpreted the “exercise of reasonable diligence” to mean that the Male Student was required to “act with some promptness” when on notice of a potential claim.²⁷ “Moreover, the fact that the injured party may not comprehend the full extent of the damage is immaterial.”²⁸ It takes very little to start the clock. Objectively, the statute of limitations has run on any claim he might have had relating to the locker rooms. So too would the claims of any student who walked in the locker rooms and recognized that there were obvious windows overlooking the changing areas in the locker rooms prior to three years before this suit was filed.

Finally, the parent-plaintiff, Gary Nestler.²⁹ The sole basis for his claim appears to be that the locker room window designed by a professional architect in a building that had to have been inspected by various government regulators before opening was not a safe environment in his opinion. He contends, without any basis whatsoever, that he is entitled to a refund of the tuition he paid for his daughter’s education because he does not consider Bishop England to be a safe educational environment.³⁰ Nestler testified his daughter complained about, and he reported to the

²⁵ *Male Student Deposition*, *supra* **Exhibit 5**.

²⁶ *Id.* at 525-26, 787 S.E.2d at 489-90 (citations and quotations omitted); see also S.C. Code Ann. § 15-3-535 (2005) (“[A]ll actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action.”).

²⁷ *Dean v. Ruscon Corp.*, 321 S.C. 360, 363-64, 468 S.E.2d 645, 647 (1996).

²⁸ *Id.*

²⁹ Nestler alleges causes of action for Negligence (Count II); Unjust Enrichment (Count III); Breach of Warranty (Count IV); and Negligent Hiring, Supervision, and Retention (Count V).

³⁰ *Nestler Deposition* 41:13 – 16; 53: 11 – 13; 54: 13 – 55: 5. **Exhibit 8**.

school that, she was bullied by other girls and had difficulties with her volleyball coach. There is no evidence that she ever complained about there being a window in the girl's locker room.³¹ Yet, he now claims the locker room windows rendered the school an "unsafe environment," though there is not a shred of evidence that the daughter was unjustifiably or improperly seen changing clothes in the girls' locker room. Nestler's opinion is without *any* evidentiary foundation and is contrary to the testimony of the architect who designed the school, who said the windows were a common safety and supervision feature.³² The school's Principal and Associate Principal likewise testified that the school environment was safe for the students.³³ Nowhere is there any provision for tuition refunds based upon a parent's self-serving opinions about the school facilities and no principle of law commands that the tuition he paid be refunded now. Rather, Nestler sent his daughter to school and she received the education he paid for while she was there.

Nestler's complaint is akin to the following: A homeopathic healthcare worker comes forward years after her daughter completed high school and demands a refund of her tuition. She says she is entitled to this because she considers the stairwells of the building to be too narrow for safety and that, had there been a fire in the school, and had her daughter been upstairs, the daughter could have been killed trying to get out. This, even though the building was designed by a professional architect; that the school had received a Certificate of Occupancy; that the building complied with all applicable building codes; and *there was no fire and no students were harmed*. His allegations are utterly frivolous and non-compensable.

³¹ *Id.* 42: 7 – 12; 49: 4 - 13.

³² *Aichele Deposition supra. Exhibit 7*

³³ *Mary Anne Tucker Deposition 52: 7 - 19 Exhibit 9; Patrick Finneran Deposition 63: 16 – 19; 85: 24 - 25 Exhibit 10.*

In short, none of the Plaintiffs have asserted legally cognizable claims for relief and they have no standing to assert individual claims or on behalf of anyone else. For that reason, Plaintiffs' Motion for Class Certification must be denied.

ARGUMENT REGARDING CLASS CERTIFICATION

Class action jurisprudence has undergone a dramatic change in recent years. The United States Supreme Court has reinvigorated the responsibility of the trial courts in delving into putative class actions and has mandated that courts take an aggressive role in weeding out cases that should not be treated on a class-wide basis. The Supreme Court has made abundantly clear that Rule 23 does not set forth a mere pleading standard to be given deference. The old plaintiff-friendly view of class certification no longer holds sway. Rather, a party seeking class certification must do more than merely plead compliance with Rule 23. Plaintiffs must present admissible evidence and affirmatively prove each required element of class certification.³⁴ Plaintiffs cannot satisfy this burden with conclusory allegations or boiler plate memoranda laden with self-serving conclusions.³⁵ It is well-settled that a class representative must be part of the class and must possess the same injury as the class members.³⁶

To succeed on a request for certification, Plaintiffs must *prove* by a preponderance of evidence that they have complied with the requirements of Rule 23(a) – numerosity, commonality, typicality, and adequacy of representation. Only if Plaintiffs have proven each element of Rule 23(a) may the Court turn to Rule 23(b)(3)'s more onerous requirements that Plaintiffs also prove

³⁴ *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 357 (4th Cir. 2014).

³⁵ *Wheeler v. Anchor Cont'l, Inc.*, 80 F.R.D. 93, 96 (D.S.C. 1978) quoting *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1312 (4th Cir. 1978).

³⁶ *Gen. Tel. Co. of Sw v. Falcon*, 457 U.S. at 156-57.

that common issues predominate over individual issues.³⁷ As the Supreme Court has emphasized repeatedly, especially with *Wal-Mart Stores v. Dukes* and *Comcast v. Behrend*, the requirements set forth in Rule 23(a) and 23(b) afford procedural safeguards in requiring the courts to take a “close look” at whether common questions predominate over individual ones.³⁸ The basic gist of *Comcast* is this: The Supreme Court meant what it said in *Wal-Mart* about lower courts habitually applying Rule 23 too broadly and that class actions are meant to be the exception, **not the rule**. The Court held that class certification should be reserved for **rare** “exception[s] to the usual rule that litigation is conducted by and on behalf of the individual named parties only.”³⁹ The Supreme Court has thus made it crystal clear that each element of Rule 23(a) and 23(b) must be proved by the Plaintiffs by a preponderance of the evidence and that the courts must analyze those claims and that evidence rigorously.

Additionally, even if Plaintiffs can meet the threshold burden of Rule 23(a), they still must satisfy the stringent requirements of Rule 23(b)(3) that (1) questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and (2) that class treatment is superior to other available methods for the fair and efficient adjudication of the controversy.⁴⁰ The predominance requirement is more stringent than the commonality requirement of Rule 23(a).⁴¹ Rule 23(b)(3)’s predominance requires that Plaintiffs establish that their proposed classes are sufficiently cohesive to warrant adjudication by representation.⁴²

³⁷ See *Comcast*, 133 S.Ct. at 1432 and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623-624, (1997).

³⁸ *Comcast*, 133 S. Ct. at 1432.

³⁹ *Id.* at 1432.

⁴⁰ Fed. R. Civ. P. 23(b)(3); *Gariety v. Grant Thornton LLP*, 368 F.3d 356, 362 (4th Cir. 2004),

⁴¹ *Thorn*, 445 F.3d at 164, n.4

⁴² *EQT Prod. Co.*, 764 F.3d at 358; *Gariety*, 368 F.3d at 362 quoting *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997).

Class certification may be precluded where there are individual questions as to elements of a claim or a defense.⁴³ In addition, individual proof of liability or individual proof of damages, where essential to liability, may defeat predominance.⁴⁴

It is important to note that Plaintiffs' frequent reliance on testimony by the Diocese's press liaison, Maria Aselage, is both inadmissible and irrelevant to class certification. As the record reflects, Aselage is not an employee of the Diocese, but is an independent contractor, whose job it is to provide statements by Diocesan officials in response to press inquiries or regarding matters appearing in the news media. (See ECF 51). She can only provide approved statements to the media, and she has no authority to make legally significant admissions on its behalf. Further, the opinions Plaintiffs' counsel attempted to elicit from Aselage are without any evidentiary foundation and are entirely inadmissible. Likewise, the use of Aselage's responses to hypothetical questions is simply improper for class determination – she has neither the expertise, nor the first-hand knowledge to provide any meaningful testimony regarding the proposed classes or their compliance with Rule 23(a) and 23(b)(3). As such, the excerpts of her deposition submitted by Plaintiffs should be disregarded entirely as they do not support any issue related to class certification.

A. Ascertainability of the Classes

While ascertainability does not appear in the text of Rule 23, it remains an essential prerequisite to class certification. As the Fourth Circuit held: “however phrased, the requirement is the same. A class cannot be certified unless a court can readily identify the class members in

⁴³ *Gariety*, 368 F.3d at 362-63; *Gunnells v. Healthplan Servs. Inc.*, 348 F.3d 417, 434 (4th Cir. 2003).

⁴⁴ *Broussard v. Meineke Disc. Muffler Shops, Inc.* 155 F.3d 331, 342-43 (4th Cir. 1998).

reference to objective criteria.”⁴⁵ A class will fail to satisfy the Rule 23 requirements where it is impossible to identify class members without an individualized inquiry.⁴⁶ Plaintiffs bear the burden of establishing ascertainability.⁴⁷ Plaintiffs have completely failed to establish that the class can even be determined.

In this case, Plaintiffs have sought certification of the following classes:

Viewed class – all those persons, or such persons’ personal representatives, heirs or assigns wherever located, who have or in the future may have any claim against Defendants The Bishop of Charleston, a Corporation Sole, Bishop England High School, Tortfeasors 1-10, the Bishop of the Diocese of Charleston in his official capacity, and Robert Guglielmone, individually, arising out of, based upon, or in any way related to, or involving injuries or damages claimed as a result of Jeffrey Scofield or any other Bishop England High School employee or agent monitoring, watching, viewing, spying, prying, besetting, photographing or videotaping them, or other such similar type conduct, through the viewing windows of the coaches’ or other BEHS officials’ offices into the locker rooms while attending Bishop England High School from 1998 through 2019.

Tuition class – all those persons, or such persons’ personal representatives, heirs or assigns wherever located, who have or in the future may have any claim against Defendants The Bishop of Charleston, a Corporation Sole, Bishop England High School, Tortfeasors 1-10, the Bishop of the Diocese of Charleston in his official capacity, and Robert Guglielmone, individually, arising out of, based upon, or in any way related to, or involving claims for reimbursement of tuition paid to Defendants as a result of Jeffrey Scofield or any other Bishop England High School employee or agent monitoring, watching, viewing, spying, prying, besetting, photographing or videotaping them, or other such similar type conduct, through the viewing windows of the coaches’ or other BEHS officials’ offices into the locker rooms while attending Bishop England High School from 1998 through 2019.

⁴⁵ *Krakauer v. Dish Network, LLC*, 925 F.3d 643, 645 (4th Cir. 2019) *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014). See also, *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592-94 (3d Cir. 2012); *John v. Nat’l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007); *Miles v. Merrill Lynch & Co. (In re Initial Pub. Offering Sec. Litig.)*, 471 F.3d 24, 44-45 (2d Cir. 2006).

⁴⁶ See *Marcus*, 687 F.3d at 593; see also *Crosby v. Soc. Sec. Admin.*, 796 F.2d 576, 579-80 (1st Cir. 1986)

⁴⁷ See e.g. *Riffle v. Convergent Outsourcing, Inc.*, 311 F.R.D. 677, 681 (M.D. Fla. 2015); *Piotrowski v. Wells Fargo Bank, N.A.* 2015 U.S. Dist. LEXIS 98688, *20 (D. Md. July 29, 2015)(denying certification where “Plaintiffs have provided no evidence that a class could be ascertained.”).

Plaintiffs' proposed classes are quintessential "fail-safe" or merits-based classes. That is, they are entirely too broad to determine – using the objective criteria required – who is and is not included in the classes. Fail-safe classes are improper because, either the class members win, in which case they are entitled to relief, or by virtue of losing, they are not in the class at all and, therefore, are not bound by any judgment.⁴⁸ An impermissible fail-safe class is one that is defined so that whether a person qualifies as a member [of the class] depends on whether the person has a valid claim on the merits.⁴⁹ Nearly every circuit court of appeals that has addressed the issue has found that fail-safe classes are improper.⁵⁰ As was the case in *Bigelow v. Syneos Health*, where the court struck plaintiffs' class allegations from the complaint, the class definition in this case turns entirely on whether each class member has a valid claim.⁵¹ That is simply impermissible under the law.

⁴⁸ *Bigelow v. Syneos Health, LLC*, 2020 U.S. Dist. LEXIS 155791, *10-12 (E.D.N.C. August 27, 2020) citing *Randleman v. Fidelity Nat. Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011) and summarizing authority regarding the impermissibility of fail-safe classes (decision attached as **Exhibit 12**).

⁴⁹ *Bais Yaakov of Spring Valley v. ACT, Inc.*, 328 F.R.D. 6, 13 (D. Mass. 2018).

⁵⁰ *Bigelow v. Syneos Health*, at *11 citing See, e.g. *Orduno v. Pietrzak*, 932 F.3d 710, 716-17 (8th Cir. 2019); *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1276-77 (11th Cir. 2019); *McCaster v. Darden Rests., Inc.*, 845 F.3d 794, 799-800 (7th Cir. 2017); *Torres v. Mercer Canyons, Inc.*, 835 F.3d 1125, 1138 n.7 (9th Cir. 2016); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 22 & n.19 (1st Cir. 2015); *Byrd v. Aaron's, Inc.*, 784 F.3d 154, 167 (3d Cir. 2015); *Randleman v. Fidelity Nat'l Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011); In *Bigelow*, the district court also noted that, "numerous treatises discuss the impermissibility of fail-safe classes. See, e.g., 7A Wright & Miller, Fed. Prac. & Proc. § 1760 & n.14.55 (discussing how the Third Circuit and "[o]ther courts... have ruled that requiring fail-safe classes for certification is improper"); Herr, Annotated Manual for Complex Litig. § 21.222 ("The order defining the class should avoid ... terms that depend on resolution of the merits."); 1 Rubenstein, Newberg on Class Actions § 3:6 ("Class definitions that require a court to decide the merits of prospective individual class members' claims to determine class membership—sometimes referred to as 'fail-safe' classes—may also [*12] run afoul of the definiteness requirement.").

⁵¹ *Bigelow*, at *12-13.

Additionally, class definitions that are too vague, too broad, or too subjective (as are the classes proposed by Plaintiffs here) cannot satisfy the ascertainability requirement for certification.⁵² Where there are no objective boundaries to the proposed classes, then Plaintiffs cannot meet the ascertainability requirement.⁵³ The proposed class of former students would appear to include so many variations that ascertainability is impossible – those students who went in the locker room and were well aware that coaches’ offices were just outside; those students who knew the coaches were charged with monitoring the locker rooms and simply did not care; those students who did care and did not change clothes in the locker area; those who showered and changed in the shower area; those students who used the restrooms, but did not change clothes in the locker area; and on and on and on. The same holds true for the tuition class. Plaintiffs’ incredibly broad definition cannot meet the ascertainability test under Rule 23.

It is worthy of note that the named plaintiffs may not even be members of the class they propose. The student-plaintiffs testified they both were aware of the coaches’ office windows and both testified they only saw the blinds closed. Neither ever saw an adult leering into the locker room. By their own proposed class definition, the two students would not be in the class. Likewise, and irrespective of the failure of his claims entirely, Gary Nestler adduced no evidence that his daughter was ever spied on, photographed or videotaped while in the locker room. So, he is not a member of his own class either.

⁵² *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015)

⁵³ *Brecher v. Republic of Argentina*, 802 F.3d 303, 305 (2d Cir. 2015)(the use of objective criteria cannot alone determine ascertainability when those criteria, taken together, do not establish the definite boundaries of a readily identifiable class).

B. Adequacy of Representation

Rule 23(a)(4) mandates that Plaintiffs prove that they will be adequate representatives of the class. Adequacy is a constitutional prerequisite to class certification and due process concerns regarding adequacy of representation have been characterized as the single most important feature of class action litigation.⁵⁴ Notwithstanding Plaintiffs' *counsels'* assertions that *they* are adequate representatives, as lawyers for the class, that is not the proper factor for consideration. Rather, the Court must apply the required rigorous analysis to determine, for example, if the plaintiffs have sufficient knowledge and understanding of the case to be able to control the litigation, and, importantly, that the Plaintiffs must establish that they, *and not the lawyers*, are directing and managing the suit.⁵⁵ The Plaintiffs must prove that they are willing and able to take an active role and protect the interests of the absentee class members.⁵⁶ After *Wal-Mart* and *Comcast*, "plaintiffs must produce actual, credible evidence that the proposed class representatives are informed, able individuals, who are themselves – *not the lawyers* – actually directing the litigation."⁵⁷

As discussed above, none of the named plaintiffs has any justiciable claim. Without any admissible evidence of some concrete harm that was caused by conduct of the Defendants, the student-plaintiffs have no standing and can assert no claim individually. Gary Nestler's entirely self-serving and baseless opinions regarding the safety of the school environment likewise fail to meet muster. He has no real claim for a complete refund of the tuition he paid, and neither do the

⁵⁴ See Linda S. Mullinax, Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Class Actions, 57 Vand. L. Rev. 1687, 1696 (2004).

⁵⁵ See e.g. *In re Kosmos Energy Ltd. Sec. Litig.*, 299 F.R.D. 133, 143 (S.D. Tex. 2014).

⁵⁶ *Id.* See also *Shiring v. Tier Technologies, Inc.*, 244 F.R.D. 307, 315 (E.D. Va. 2007); *Black v. Rhone-Poulenc, Inc.*, 173 F.R.D. 156, 162 (S.D. W. Va. 1996); and *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 479 (5th Cir. 2001) ("The adequacy requirement mandates an inquiry into . . . the willingness and ability of the representative to take an active role in and control the litigation and to protect the interests of absentees[.]").

⁵⁷ *In re Kosmos Energy*, 299 F.R.D. at 144, citing *Berger v. Compaq*, 257 F.3d at 484.

class of similarly situated individuals he seeks to represent. It is axiomatic that, in the absence of a personal claim, they cannot represent a class of other individuals for any reason.

Further, both students appear to have been recruited by opposing counsel to be plaintiffs in this action and clearly are not the driving force behind this lawsuit:

Female Student

Q: How did you find the Richter Firm?

A: The Richter Firm found me.

Q: Okay. How did they find you?

A: They got in touch with my parents, who gave them my phone number and e-mail, and they got in touch with me asking if I would like to be part of this case, and I agreed.

Q: And when did they get in touch with you about that?

A: About January of 2020.

Q: Prior to January of 2020, had you had any contact with the Richter Firm?

A: No.⁵⁸

Male Student

Q: How did you come to file this lawsuit?

A: My mother spoke to the Richters or the Richters spoke to my mom. They asked to meet my mom, and from there, they had a meeting, and then my mother reached out to me and said they were looking – that they would like to speak to me, and then I spoke with them, and they informed me, and from there, came.

Q: What did your mother talk to the Richter firm about?

A: Just about the whole incident. She didn't really inform me much, just if I was willing to meet with the lawyers.

Q: How did the Richters find your mother?

A: Most likely, after her – after she was in the incident with Bishop England.

Q: And that's when she got fired?⁵⁹

⁵⁸ Female student deposition, 23: 3 – 14, *Exhibit 6*.

⁵⁹ Male student deposition, 20: 12 – 18; 20: 22 – 21: 5, *Exhibit 5*

Clearly, the two students were approached by Counsel and were subjected to classic barratry after their mother's employment discrimination case against the Diocese and Bishop England was dismissed – their true motives must come under some question. Further, Female Student in college in Spain – how much true direction can a college student studying abroad be expected to give the lawyers? Rather, it is more likely that the student-plaintiffs are free riders on this entrepreneurial lawsuit that is really being directed by the lawyers.

Nestler refused to answer any questions regarding how he came to file suit.

Given these facts, the Plaintiffs have not made the required evidentiary showing that they are adequate representatives.

C. Plaintiffs have failed to establish Commonality or Typicality.

The commonality and typicality requirements of Rule 23(a)(3) have tended to overlap, and serve as a “guidepost for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.”⁶⁰ The inquiry really is whether the questions will generate common answers for the entire class.⁶¹ A common question is one that can be resolved for each class member in a single hearing. By contrast, a question is not common, if its answer turns on consideration of the

⁶⁰ *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 157 n.13 (1982); *Kidwell v. Transp. Comm'n Int'l Union*, 946 F.2d 283, 305 (4th Cir. 1991).

⁶¹ *Wal-Mart*, 564 U.S. at 351. *See also Ferrenas v. American Airlines, Inc.*, 946 F.3d 178 (3d Cir. 2019)(reversing class certification where “It is not clear how those questions can generate common answers apt to drive the resolution of the action)(cleaned up). Posing generically common questions does not suffice; courts focus instead on common answers. “What matters to class certification . . . is not the raising of common ‘questions’— even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.” *Wal-Mart*, 131 S. Ct. at 2551. “Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.” *Id.*

individual circumstances of each class member.⁶² Common questions are not enough where the answer may be different for each class member and will determine whether the person is, or is not, in the class.⁶³ Rather, what the court looks for is a common issue, the resolution of which will advance the litigation.⁶⁴ “Class certification is only proper when a determinative critical issue overshadows all other issues.”⁶⁵

1. Because the Court will be required to conduct individualized inquiries of each and every member of the putative class to determine when the applicable statute of limitations began to run, class certification is inappropriate.

As noted above, at the very least, Male Student’s claims, to the extent he has any, are barred by the applicable statute of limitations. Stale claims present substantial obstacles to predominance and therefore are largely unsuitable for class treatment. That is because the question of when a statute-of-limitations period starts “focuses on the contents of the plaintiff’s mind, [which] is not readily susceptible to class-wide determination.”⁶⁶ As a result, “the record must affirmatively reveal that resolution of the statute of limitations defense on its merits may be accomplished on a class-wide basis.” The burden of proving that matter lies squarely with Plaintiffs as the movants—and not with Defendants.⁶⁷ “[W]hen the defendant’s affirmative defenses (such as . . . the statute of limitations) may depend on facts peculiar to each plaintiff’s case, class certification is erroneous.”⁶⁸

⁶² *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006) (citing 7A Charles Allen Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1763 (3d ed. 2005)).

⁶³ *Paulino v. Dollar Gen. Corp.*, 2014 U.S. Dist. LEXIS 64233, *14 (N.D. W. Va. May 9, 2014).

⁶⁴ *Parks Auto. Group, Inc. v. Gen. Motors Corp.*, 237 F.R.D. 567, 570 (D.S.C. 2006); *Stott v. Haworth*, 916 F.2d 134 (4th Cir. 1990) (stating that there must be “commonality . . . between the claims of each plaintiff that would propel [the] case through class treatment . . .”).

⁶⁵ *Id.* at 145.

⁶⁶ *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 320 (4th Cir. 2006).

⁶⁷ *Id.* at 321-322.

⁶⁸ *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 342 (4th Cir. 1998).

Plaintiffs with untimely claims must rely on an “accrual” or “discovery” rule, which delays the beginning of their limitations period. Under the South Carolina discovery rule, the limitations period begins when a party “knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct.”⁶⁹ The test objectively gauges whether a person would have been “on notice . . . that some claim against another party might exist.” *Id.*

Courts have found that this test is subjective and defies class wide adjudication. The Fourth Circuit in particular has consistently adhered to that view. For example, in *Thorn*, the Fourth Circuit noted that “[e]xamination of whether a particular plaintiff possessed sufficient information such that he knew or should have known about his cause of action will generally require individual examination of testimony from each particular plaintiff to determine what he knew and when he knew it.”⁷⁰ In *Broussard*, the Fourth Circuit reversed an order granting class certification because, among other flaws, evidence about each class member’s knowledge was “critical” to whether that person’s claims were “time-barred by [the] three year statute of limitations[.]”⁷¹

Determining whether the statute of limitations bars any particular class member’s claim will surely depend on facts peculiar to each class member, an individual inquiry that renders certification improper. Plaintiffs urge that the Court focus solely on the actions of the Defendants. However, the Court cannot ignore such critical issues as what each class member knew and when they knew it. A plaintiff’s knowledge normally requires individual evidence and that element

⁶⁹ *Martin v. Companion HealthCare Corp.*, 593 S.E.2d 624, 627 (S.C. Ct. App. 2004).

⁷⁰ *Thorn*, 445 F.3d at 320.

⁷¹ *Broussard*, 155 F.3d at 342.

alone will defeat class certification.⁷² The Fourth Circuit has held that it is reversible error for a court to fail to consider plaintiff-focused issues such as their individual knowledge.⁷³

2. Plaintiffs have failed to prove that there is a reliable model for determining class-wide damages.

Plaintiffs must demonstrate “through evidentiary proof” that their “damages are capable of measurement on a class-wide basis.”⁷⁴ Without that, “[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class.”⁷⁵ “Mere assurance” that a reliable methodology exists is “insufficient[.]”⁷⁶ In Plaintiffs’ motions, no class-wide means of measuring damages is offered—much less supported through evidentiary proof. Rather the psychologist retained by Plaintiffs testified that, while each student may be affected in some way by the revelation that Jeffrey Scofield photographed five boys in 2019, each student would be affected differently.⁷⁷ Plaintiffs merely repeat the elements of each claim – including resulting damage from whatever wrong they allege. Plaintiffs are silent on how those damages can be calculated generally.⁷⁸ Because Plaintiffs have failed to present a reliable class-wide model for damages, the Court should deny class certification for that reason alone.

⁷² *EQT Products v. Adair*, 764 F.3d at 369; citing *Thorn v. Jefferson-Pilot*, 445 F.3d at 321.

⁷³ *EQT Products*, 764 F.3d at 369 (District court erred in failing to give any consideration to the individual evidence of each class member’s knowledge in finding the statute of limitations was tolled by defendants’ engaging in fraudulent concealment).

⁷⁴ *Comcast*, 133 S. Ct. at 1432-33; see also *Bright v. Asset Acceptance, LLC*, 292 F.R.D. 190, 202-03 (D.N.J. 2013) (“[A] plaintiff seeking class certification must present evidence of a reliable methodology for calculating damages on a class-wide basis.”).

⁷⁵ *Comcast*, 133 S. Ct. at 1433.

⁷⁶ *Bright*, 292 F.R.D. at 202-03.

⁷⁷ *Salas deposition*, 67: 20 – 68: 10; 76: 15 – 77: 5; 78:23 – 79: 5 **Exhibit 2**.

⁷⁸ See, e.g., *Bright*, 292 F.R.D. at 202-03 (denying class certification because, among other defects, plaintiff “provided no model for calculating actual damages on a class-wide basis”).

Plaintiffs' omission is not surprising, for there is no reliable class-wide model for damages and they *cannot* establish such a model. Each class member's loss would have to be figured separately, based on all sorts of overlapping variables – and importantly some, nearly all, members of the putative class have suffered no damage at all.

Because Plaintiffs simply cannot establish by the requisite proof the element of commonality, whether as to the applicability of the statute of limitations, or establishing some common answer to the question of damages, the motion for class certification must be denied.

D. Plaintiffs Cannot Establish the Requisite Numerosity.

The only evidence is that Jeffrey Scofield took photographs of five boys in 2019. None of those boys is involved in this action. Neither student-plaintiff could testify that they had been photographed in the locker rooms by anyone. Plaintiffs have adduced no evidence of the number of people who are in the respective proposed classes, as those classes are now defined. Rather, Plaintiffs are attempting to lump together every student who ever set foot in the locker rooms between 1998 and 2019 and every person who paid tuition during the class period – that simply cannot suffice to establish numerosity.

E. Plaintiffs have Failed to Establish Either Rule 23(b)(3) Requirement.

Plaintiffs have adduced not a shred of admissible evidence that they have satisfied their heavy burden to establish that their claims – Wrongful Intrusion into Private Affairs, Negligent Hiring, Supervision and Retention, and general Negligence for the student class; Breach of Warranty, Unjust Enrichment, Negligent Hiring, Supervision and Retention, and Negligence for the parent class – are in any way amenable to class-wide, common proof.⁷⁹ The predominance

⁷⁹ *EQT Prod. Co.*, 764 F.3d at 366; also *Brown v. Electrolux Home Prods., Inc.* 817 F.3d 1225, 1234 (11th Cir. 2016).

inquiry requires that the Court examine the parties' claims and defenses and their elements and then determine whether those elements require common or individualized proof.⁸⁰ The inquiry is qualitative and not quantitative and should focus on the issues that will likely dominate at trial.⁸¹ Courts must analyze and take into account Defendants' affirmative defenses and whether there are claimant-specific defenses (the statute of limitations, knowledge, lack of reliance, lack of causation for example) may predominate over common ones.⁸²

1. Plaintiffs have not established the required element of predominance.

As is discussed above, Rule 23(b)(3)'s predominance requirement further mandates that Plaintiffs show how they would prove causation and damages with common proof – which they have not done – and failing that, individual issues will predominate and defeat class certification.⁸³ There is simply no class-wide proof that all parents and tuition-payers suffered a common injury due to the conduct of these Defendants. Likewise, there is no class-wide proof that all students were harmed in the same manner by the ability of an adult to monitor the locker rooms at the high school for misconduct.

In this case, the class members' claims can *only* be proved by individualized evidence and Defendants' would necessarily present particularized defenses to each claim. That, standing alone, defeats certification.

⁸⁰ See *Brown v. Electrolux*, 817 F.3d at 1234. Cited with approval *Naparella v. Pella Corp.*, 2016 U.S. Dist. LEXIS 72442, at *39-41 (D.S.C. June 3, 2016)(Norton, J.) and *Romig v. Pella Corp.*, 2016 U.S. Dist. LEXIS 72437 (D.S.C. June 3, 2016)(Norton, J.).

⁸¹ See e.g. *Parko v. Shell Oil Co.*, 739 F.3d 1083 (7th Cir. 2014); *Harnish v. Widener Univ. Sch. Of Law*, 833 F.3d 298, 304-05 (3d Cir. 2016).

⁸² *Stuart v. Global Tel *Link*, 956 F.3d 555 (8th Cir. 2020); *Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240 (5th Cir. 2020). See also *Gariety v. Grant Thornton*, 368 F.3d at 362 (Proof of reliance is generally individualized to each plaintiff).

⁸³ *Comcast*, 569 U.S. at 37

Gary Nestler and the proposed parent class.

Nestler's daughter attended Bishop England for all of her freshman year and one semester of her sophomore year – between August, 2017 and January, 2019. Nestler claims that he was promised that his daughter would be educated in a safe, nurturing environment when she was still in eighth grade and prior to her enrollment at Bishop England. Plaintiffs have presented no evidence that the parents of every aspirant to attend Bishop England received or relied on any such statements, or that either the warranty claim (to the extent such a statement can even be construed as an oral warranty) or unjust enrichment claim can be determined for the entire class with common proof. Rather, individual questions of whether such a statement was made; whether any parent relied exclusively on such a statement; and whether there existed of any sort of oral contract between the school and each parent will be overwhelmed by individualized evidence from every single parent who sent a child to Bishop England over the past 20 years. Likewise, each parent's particular knowledge of the locker rooms and the windows and whether any parent other than Nestler believes those windows are patently unsafe will necessitate testimony from thousands of individual parents. These highly individualized elements of proof will be required to establish the essential elements of a breach of warranty claim for each and every member of the proposed class.

So too with Nestler's claims for negligent hiring and general negligence. There is no basis for, and zero class-wide common evidence of, any negligence in hiring or retaining every single Bishop England employee for more than two decades. Rather, trial of these claims would require deeply individualized inquiries into every employee ever to set foot on Bishop England's campus to determine the elements of both negligent hiring, retention, and supervision, and general negligence – what duty did the school owe in each particular employee's individual circumstances

and how did the school breach any duty to anyone? The claims also bring forward individualized affirmative defenses – the school’s lack of any prior knowledge of some dangerous condition; individual parents’ knowledge of the windows and condonation of their children changing clothes there; whether any parent agrees with LS3P and defense experts regarding the need for a school to provide a mechanism deter bullying or fighting and the appropriate method for doing so. The answer to the questions presented under the employment and negligence claims, dating back to 1998 cannot be answered with class-wide proof.

The former students and the “viewed” class.

As with Gary Nestler, the myriad of individual issues of fact, the elements of the causes of action, and the affirmative defenses applicable to the claims of thousands of students, alumni, and former students, completely overwhelms and subsumes any class-wide treatment of their claims. The privacy claims alone would require massive individualized evidence regarding whether any child over the last 20 years actually had his or her privacy invaded unjustifiably. Whether any student suffered *any* injury at any time will completely depend on individualized evidence. Likewise, as Dr. Salas admitted, the extent of any impact on any former student will be entirely individualized. Whether any student’s injury was proximately caused by Bishop England will depend entirely on individualized proof. Whether the school’s actions were reasonable at the time will depend on individualized evidence. The student-plaintiffs have not established their burden under Rule 23(b)(3) that common proof will establish the required elements of their claims and damages.

The student-plaintiffs’ wide-ranging employment-related claims implicate everyone who ever worked at Bishop England and demand individual inquiries both regarding every student who attended the school and entered the locker rooms, but also every employee who may have entered

the coaches' offices. The trial will require thousands of former students and likely hundreds of employees to testify regarding these claims and will raise affirmative defenses, that while generally common, rely on individual proof.

2. Plaintiffs likewise fail to show superiority of the class device.

Rule 23(b)(3) also requires a determination by the Court that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.⁸⁴ Courts must inquire into four areas to determine superiority:

- (a) The class members' interest in individually controlling the prosecution of separate actions;
- (b) The extent and nature of any litigation concerning the controversy begun by class members;
- (c) The desirability of concentrating the litigation of claims in the particular forum; and
- (d) The likely difficulties in managing a class action.⁸⁵

In particular, the "individual interest" inquiry militates against a finding of superiority. The inquiry turns on the cost of litigation the class members' claims, and the complexity of the issues surrounding those claims. If individual lawsuits are worth enough on their own, then a class action normally will not be superior to individual litigation.⁸⁶ Individuals who can prove they actually were photographed or videotaped and damaged for whom the statute of limitations may not have run should have sufficient individual interest to pursue their own claims. There is no impediment to their pursuing their own claims, and there is little benefit to them from participating in a class

⁸⁴ Fed. R. Civ. P. 23(b)(3).

⁸⁵ *Id.*

⁸⁶ See e.g. *Castano v. Amer. Tobacco Co.* 84 F.3d 734, 748 (5th Cir. 1996)(no superiority where individual damage claims are high).

action. Conversely, a class action cannot be superior where all, or nearly all, members of the proposed class have no injury and no damages whatsoever. At that point, the class members are little more than free riders on entrepreneurial litigation – litigation where they would not, and could not, prevail on their own.

A second factor that militates against class treatment is the utter and complete unmanageability of any trial(s). As noted above regarding predominance – virtually every former student will have to establish that they were injured as a result of some specific conduct by a specific employee of Bishop England dating back to 1998. The court would have to conduct numerous trials within a trial: were you a student? is your claim time-barred? were you viewed illicitly and without reason? did you suffer mental harm as a result? and innumerable other individualized inquiries. The school would necessarily assert appropriate affirmative defenses to each claim, and each would require its own evidence and testimony.

In short, Plaintiffs have failed to present any evidence that establishes that the proposed classes satisfy the stringent requirements of Rule 23(b)(3). There is, quite simply, nothing supporting either predominance or superiority. Rather, all the evidence is that the proposed classes will create an unwieldy, inefficient, quagmire of individualized issues, both regarding the claims of each member of the proposed classes and the various defenses that will be asserted. In short, neither Rule 23(b)(3) condition has been met and these claims simply cannot be treated on a class-wide basis.

CONCLUSION

As supported above, Plaintiffs have failed to meet their burden of demonstrating that their purported classes satisfy the requirements of Rule 23(a) and Rule 23(b)(3), Fed. R. Civ. P., and in

fact, Plaintiffs cannot do so. Accordingly, Plaintiffs' Motion for Class Certification must be denied in full

Respectfully submitted,

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ATTORNEYS FOR DIOCESE DEFENDANTS

January 19, 2022

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JA1362

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Deposition of:

Amanda Salas, MD

=====

Gary Nestler, et al

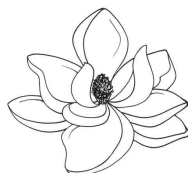
v.

**The Bishop of Charleston, a Corporation Sole, Bishop
England High School, et al**

Case #: 2:21-cv-00613-RMG

November 10, 2021

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1 what they're provided with to change, undress,
2 disrobe, utilize the facilities for toileting and
3 showering, however normal use of a locker room
4 would be perceived, that having the transparent
5 window where people have access to and I
6 understand that it was by the design of the
7 building, was in place to prevent conflict
8 between students or --

9 Q. Fights and bullying?

10 A. -- fights and bullying, I think
11 smoking or something.

12 Q. Hazing.

13 A. But all of that, the nature of that
14 transparency into the privacy, once you have
15 somebody who rises to the occasion to recognize
16 that is not safe and they utilize it, what may
17 have been benign is now very malignant. So that
18 makes it very concrete for the person who would
19 have been the student in the locker room.

20 They may have not thought about it,
21 because you don't know what you don't know. And
22 it may have been tolerated, because people didn't
23 go against it. It was there for the construct of
24 the building and forward. But the nature of how
25 that affects an individual, it's gonna affect

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1 individuals differently, but they're gonna be
2 affected.

3 Q. Okay. So every student who is --
4 every Bishop England alumnus who has since
5 learned that Jeffrey Scofield did bad things
6 would be affected by that differently, correct?

7 MR. RICHTER: Object to the -- I
8 object to the form of the question.

9 THE DEPONENT: That's a fair
10 assessment, yes.

11 BY MR. DUKES:

12 Q. Okay. What -- in your opinions you
13 say that the windows in the locker rooms -- and
14 have you ever seen the design drawings of that?

15 A. I don't think I've seen the design
16 drawing. There was a picture of the window --

17 Q. Uh-huh.

18 A. -- in the --

19 MR. RICHTER: Complaint.

20 THE DEPONENT: Complaint. Thank
21 you.

22 BY MR. DUKES:

23 Q. And you didn't read the deposition of
24 Ken Richardson, did you --

25 A. No.

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1 Q. Okay. Have you interviewed anybody
2 who was unaware that the windows were there?

3 A. No.

4 Q. Have you interviewed anybody who was
5 unaware that there was a coaches' office on the
6 other side?

7 A. No.

8 Q. When both female student and male
9 student were enrolled at Bishop England, did
10 they express that they were embarrassed or
11 uncomfortable changing clothes in the locker room
12 with everybody else?

13 A. They did not share that information
14 with me.

15 Q. Okay. Can we agree that every
16 teenager will have a different level of comfort
17 changing clothes in a locker room?

18 MR. RICHTER: Object to the
19 form.

20 BY MR. DUKES:

21 Q. You'd have to ask each one of them,
22 right?

23 A. If you want to understand how somebody
24 feels when they're undressing, you would have to
25 ask that individual.

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1 Q. You can't just make generalizations?

2 A. Some people may feel so comfortable
3 undressing that they make other people feel
4 uncomfortable and there can be pathology related
5 to that, as well.

6 Q. Okay. And in your experience in this
7 -- in that respect, boys are different than
8 girls?

9 A. You know, I don't want to align with
10 one gender or another, but yes, I think that
11 that's thought that boys are different than
12 girls.

13 Q. That a boy might be less insecure
14 about changing clothes in a locker room than
15 perhaps a girl?

16 A. I guess that can go either way.
17 People are gonna be different and I don't know
18 that this falls along solely gender lines.

19 Q. Okay.

20 A. But I think it's fair to say that -- I
21 know from when I was a kid, as girls going over
22 spending the night at somebody else's house we'd
23 sleep in the bed with each other, didn't think
24 anything about it, but brothers were not doing
25 the same thing.

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1 Q. Okay. What is the basis for your
2 opinion that every student who has changed
3 clothes in the locker room at Bishop England is
4 expected to be impacted by the fact that there
5 was a window there?

6 A. That this is -- this is a sensitive
7 situation. This is disrobing, this is
8 undressing, that there's a lot of structure that
9 goes into Bishop England and as female student
10 conveyed more so than male student, the
11 perception is is that you're gonna go into the
12 mold and this is how you're gonna be.

13 Q. Okay. But that's just an atmosphere
14 that she perceived at Bishop England, no matter
15 what it was?

16 MR. RICHTER: Object to the
17 form of the question.

18 THE DEPONENT: That's how she
19 described it to me, so that is her
20 perception. And that's her perception.

21 BY MR. DUKES:

22 Q. But other students are gonna have
23 entirely different perceptions, right?

24 MR. RICHTER: Object. It's
25 calling for speculation. Object to the

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1 form of the question.

2 THE DEPONENT: Other students
3 are not gonna have had the same experience
4 as the female student that has been
5 interviewed. But clearly, from what she
6 told me, this is something that was talked
7 about at mass amongst who ever she was with.
8 I'm assuming other girls. And it became a
9 big deal. And to me, when I -- I see also
10 in the discovery or not discovery, that
11 would have been the exhibit of the
12 complaint, a letter that came, I believe it
13 was from the principal, that this has
14 happened and we offer counseling services,
15 whether it's through the pastoral
16 counseling, whether it's professional
17 services, it seems to be well recognized
18 that this is impacting. This does impact
19 other people.

20 BY MR. DUKES:

21 Q. Okay. But you didn't learn that until
22 after you had prepared your report, right?

23 A. Right. Which --

24 Q. So that, the complaint and its
25 exhibits did not go into forming your opinion?

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1 interviewed these two students and the idea
2 that that was an opportunity and it was an
3 opportunity that someone did have light shed
4 on the fact that they utilized it, it's
5 expected that that would give you some kind
6 of pause and psychological component to fit
7 into an individual's life like that could
8 have been me.

9 BY MR. DUKES:

10 Q. But you have --

11 A. It's kind of an idea of if I'm driving
12 across a bridge and the bridge collapses, but I
13 made it across the bridge, but the car behind me
14 almost didn't, and the car behind it didn't, I
15 might go on and be okay until I learned, wow, do
16 you realize just how close that was on that day
17 to ending my life. And it's a moment where you
18 take pause.

19 And some people may take pause and
20 think about it, reconcile whatever the issue is,
21 and they may not rise to the threshold of coming
22 into a psychiatrist's office or a counselor's
23 office or they may not even go to their pastor
24 about it. And there are other people who have
25 different psychological structure, different life

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1 experiences.

2 But this was a high school experience.
3 This high school's kind of a key component in
4 childhood develop. And the idea that a person
5 who has been in that situation would be affected
6 and it would be negative on their psyche,
7 that's as -- that's as obvious in the world of
8 psychiatry as I'm not gonna find an article that
9 says it's this obvious, because you're also not
10 gonna find an article that says something along
11 the lines of people get pregnant by having
12 intercourse. It's known. It's like this is --
13 this is so obvious that the idea of a window
14 being present, I am following procedures and if I
15 don't follow the procedures, I can be disciplined
16 whether however that is. I don't want to go on
17 that path, but you could be reprimanded for not
18 following the procedure.

19 But that is something that upon
20 learning, wow, I was in that space that was
21 utilized just as it was when I was in it, it's
22 going to have that kind of impact in someone's
23 psyche. But the degree and the nature and what
24 one person experiences versus another, that's not
25 necessarily the same.

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1 Q. Okay. So, and I like your analogy of
2 driving across the bridge that then collapses.

3 A. We'll try to work with it then.

4 Q. That is the realization, oh, my, I
5 could have been killed?

6 A. Yes.

7 Q. But you weren't?

8 A. Yes.

9 Q. And it's the same thing here, right?
10 I could have been photographed, I could have been
11 seen, but as far as I know, I wasn't?

12 A. Well --

13 MR. RICHTER: Object to the form
14 of the question.

15 BY MR. DUKES:

16 Q. Correct?

17 A. As far as I know, they weren't and it
18 still impacts them, yes.

19 MR. DUKES: I think that's all I
20 have for you, ma'am. Thank you.

21 THE DEPONENT: Okay. Can we
22 take a break?

23 (Whereupon, there was a short
24 break in the proceedings.)

25 E-X-A-M-I-N-A-T-I-O-N

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1 C E R T I F I C A T E

2

3 STATE OF SOUTH CAROLINA)

4 COUNTY OF BERKELEY)

5

6 I, Nicole D. White, Certified Court
7 Reporter and Notary Public, State of South
8 Carolina at Large, certify that I was authorized
9 to and did stenographically report the foregoing
10 deposition of Amanda Salas, M.D.; and that the
11 transcript is a true record of the testimony given
12 by the witness, and was sworn as such.

13 I further certify that I am not a
14 relative, employee, attorney or counsel of any of
15 the parties, nor am I a relative or employee of
16 any of the parties' attorney or counsel connected
17 with the action, nor am I financially interested
18 in the action.

19 WITNESS MY HAND AND OFFICIAL SEAL this
20 20th day of November 2021.

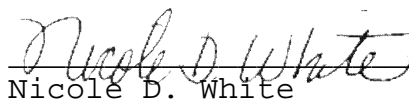
21

22

23

24

25 My Commission expires September 8, 2027



Nicole D. White
Notary Public in and for the
State of South Carolina



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EXHIBIT 3

Myles Glick Architect LLC

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October 25, 2021

Myles Glick Architect, LLC
66 Rebellion Road
Charleston, South Carolina 29407

Richard S. Dukes Jr. Attorney
Turner Padget
P.O. Box 221291
Charleston, SC 29413
rdukes@turnerpadget.com

Re: Report of Findings-Bishop England High School Coaches' Office Windows
Bishop England High School
Daniel Island, South Carolina

Dear Mr. Dukes,

I appreciate the opportunity to present this report to you regarding the analysis of the design and installation of a window in the coaches' offices in the boys and girls locker rooms (Rooms # C 121, C 144 and C149). My scope of work was to conduct an investigation to determine if the design and installation of a window in the coaches' offices violated any standard of care. The methodology was to collect data, research the issues, visit the site and draw conclusions.

A. Methodology / Basis of Opinion

The investigation included the review of the architect's building program (BE 003117) (page 67), plans and specifications. A site visit (10/15/2021) was also conducted at Bishop England High School. In addition, the investigation included a review information gathered regarding other high schools in the Charleston County School District, the Berkeley County School District and the Dorchester II School District.

Research was also conducted nationwide to determine if view windows in coaches' offices were a standard of care. A review of the School Design Standards for the Albuquerque Public Schools indicates on page 115, "Provide a private office with windows to view traffic in and out of the locker room area. In addition, the Guidelines for School Facilities in Virginia's Public Schools indicates on page 19, "Staff offices should be provided with the following. A view window from the male office to the male

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dressings room and a view window from the female office to the female dressings area. The design of the room should be configured to restrict line of sight when office door is open.”

Industry design standards were also reviewed. The school design guidelines stated in GearBoss in the Wenger High School Planning Guide indicates the following regarding school security. On page 8, “Staff offices: Locations should be situated around the facility in areas of high visibility to enforce security and oversight”. On page 12, “windowed doors and windowed walls greatly increase ability to monitor spaces and movement within the facility” and on page 13, Athletic offices serve many functions beyond providing a place for administrative work and meetings. They should be placed in proximity to student areas to allow coaches to connect to their teams.”

In addition, the following expert reports and deposition was reviewed.

Amanda B. Salas, MD
Consulting Forensic Psychiatrist
32 Newpoint Road
Beaufort, SC 29907

Kendrick E. Richardson, M.S., P.E.
Engineering Expert, Inc.
3 Gamecock Avenue, Suite 301
Charleston, SC 29407

Deposition of Roger M. Attanasio
30 (b) (6) LS3P
Deposition taken August 20, 2021

Deposition of Eric Aichele
Deposition taken October 13, 2021

B. Introduction

Bishop England High School was built in approximately 1997/1998 on Daniel Island, South Carolina. The architect’s plans dated October 26, 1996 by LS3P Architects of Charleston, SC shows a window in one wall of the coaches’ offices facing into the locker room (sheet A-103) (Rooms # C 121, C 144 and C149).

There was a 4’ x 4’ (approximately) window in the three coaches’ offices looking into the locker room. The purpose of the view windows is for general supervision of the locker rooms. They were removed at the time of my site visit on October 15, 2021. The openings have concrete block filling in the location of the previous view window. The views are into an area where lockers are located and not into any shower areas or wet areas. The shower areas contain an area for showering, undressing and dressing per the

architectural plans. These areas are surrounded by privacy curtains and are approximately 18 and 28 feet from the coaches' view windows. The shower areas are not in the direct line of sight. The entrance door into the coaches' offices have key locks and a view window with a blind located in the upper third of the door. The windows are eighteen inches square. The purpose of the door view windows is for security in order to allow views into the coaches' offices.

C. Findings

A review of High Schools in three School Districts in the Low Country indicates the following.

School District / School	View Window in Office
Charleston County School District	
West Ashley High School	Yes
Burke High School Wando High School	Yes
Stall High School	Yes
North Charleston High School	Yes
D-4 Stadium	Yes
Berkeley County School District	
Cane Bay High School	Yes
Goose Creek High School	Yes
Stratford High School	Yes
Stratford High School	Yes
Timberland High School	Yes
Hanahan High School	Yes
Berkeley High School	Yes
Dorchester School District II	
Summerville High School	Yes
Ashley Ridge High School	Yes
Dubose Middle School	Yes
Oakbrook Middle School	Yes
River Oaks Middle School	Yes

D. Discussion

Parents and students have a reasonable expectation that schools are safe. The method of security in a high school locker room is the placement of a window in a coaches' or PE teacher's offices looking into the respective locker rooms. Typically, some types of

blinds are in the window to provide privacy for the coach or PE teacher when talking to other students and for the general supervision of the locker room. Blinds can be opened for eyes on the potential events without having the need for the view windows to be always unobstructed. The view window is installed and placed in the office wall to address security concerns that include theft, bullying, fights, harassment, drugs and possibly fire arms.

The layout of the shower area and the location of the shower area allows privacy for the individual. The location of the showers at Bishop England School cannot be seen from the view windows.

There are two levels of security. The view window provides general supervision. Based on activities/disturbances, specific supervision can take place which is a hands-on approach by the supervisor entering the locker room and dealing with the situation observed.

E. Conclusions

Surveillance of the locker room and the installation of security windows in the coaches or PE teacher's offices (Rooms # C 121, C 144 and C149), are "standard of care" for architects and school districts. As architects, student safety and security are a priority. View windows provide the necessary security/supervision for locker rooms in high schools in the Low Country and across the United States. The design and installation of the view windows at Bishop England High School, as shown on the architect's plans dated October 26, 1996, meets the standard of care within a high degree of architectural certainty.

This report is based on information known at the time of this report and if new information is discovered or provided, this report of findings may be revised. Because the observations are limited, there is no claim either stated or implied that all conditions were reviewed or observed. If you have any questions on any items included in this report, please do not hesitate to call.

Sincerely,



Myles Glick, AIA LEED AP

Attachment: Photographs from Site Visit 10/15/2021

Myles Glick Resume

Myles Glick Rate Sheet 2021

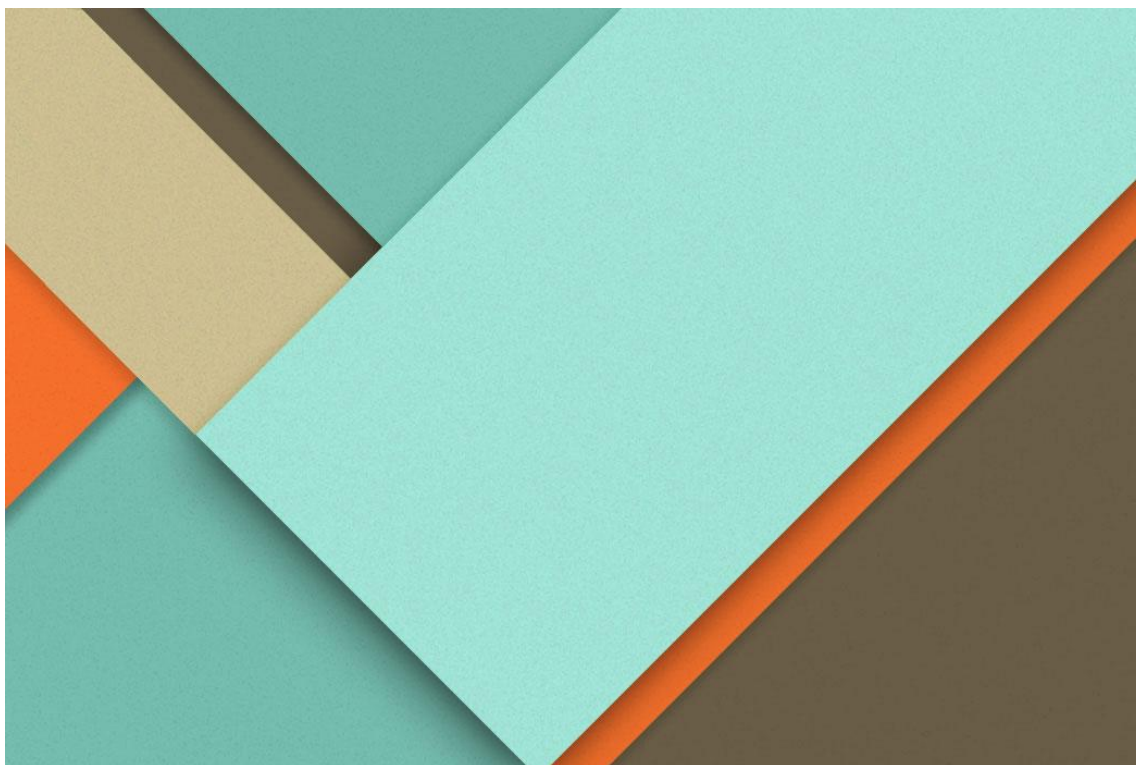
GearBoss in the Wenger High School Planning Guide

School Design Standards for the Albuquerque Public Schools

Guidelines for School Facilities in Virginia's Public Schools

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EXHIBIT 4



Bishop England High School

10.20.21

—

William L. Runyon III

Runyon Educational Consulting

2062 Syreford Court

Charleston, South Carolina 29414

Overview

This report contains my professional background information, experiences over thirty years in educational settings as a teacher, coach and school administrator and professional recommendations based upon research and experiences relating to student safety involving specifically school locker rooms.

Goals

1. To establish professional knowledge, training, experience and credibility in order to support my findings.
2. To evaluate the reasonable design of the Bishop England High School Locker Room Facility.

Professional Experience

I began my professional career as an educator and coach in 1988 while an undergraduate student at The College of Charleston majoring in Physical Education and Health with a concentration in Teacher Certification. During the course of my undergraduate years (1988 - 1992) I served professionally as follows:

- Student Director of Intramurals (The College of Charleston) - Responsibilities included departmental staffing, program scheduling, facility coordination, facility renovation in the F. Mitchell Johnson Center's indoor courts, weightroom, locker rooms and outdoor facilities used in coordination with Charleston County Parks and Recreation and The City of Charleston's Parks & Recreation.
- Summer Camp Counselor (The College of Charleston, The Citadel, Bishop England High School) - Responsibilities included instruction, supervision and operations of basketball day camps and overnight stay camps.
- Assistant Basketball Coach (Bishop England High School) - Responsibilities included student-athlete supervision, player development, scouting and coaching in practices and games for the Junior Varsity and Varsity.

Upon graduation from The College of Charleston with South Carolina Teacher Licensure (#168545) in Physical Education and Health, later adding Emergency Certification in Math Grades 9-12 (1998), I served as a Physical Education Teacher, Math Teacher, Basketball Coach, Football Coach, Soccer Coach and Track and Field Coach at the following South Carolina Public High Schools:

- R.B. Stall High School (1992 - 93, 1998 - 2002) - Responsibilities included Junior Varsity Boys Basketball Head Coach (1992-93). Varsity Basketball Head Coach (1998 - 2002), Varsity Track and Field Coach (1998 - 2002), Physical Education Teacher, Health Teacher, Math Teacher and Science Teacher. These duties required me to safely supervise students and student-athletes in instructional settings (classrooms, indoor / outdoor facilities, locker rooms) and competitive settings while delivering South Carolina approved curriculum and coaching student-athletes in conjunction with the regulations of The South Carolina High School League and its governing National Federation in the school's facilities, as well as school facilities for Away Games and events.
- Cross High School (1993 - 1994) - Responsibilities included Head Varsity Boys Basketball Coach, Assistant Varsity Football Coach and Physical Education and Health Teacher. These duties required me to safely supervise students and student-athletes in instructional settings (classrooms, indoor / outdoor facilities, locker rooms) and competitive settings while delivering South Carolina approved curriculum and coaching student-athletes in conjunction with the regulations of The South Carolina High School League and its governing National Federation, as well as school facilities for Away Games and events.
- Garrett Academy of Technology (1994 - 1998) - Responsibilities included Head Varsity Boys Basketball Coach, Assistant Varsity Football Coach and Physical Education and Health Teacher. These duties required me to safely supervise students and student-athletes in instructional settings (classrooms, indoor / outdoor facilities, locker rooms) and competitive settings while delivering South Carolina approved curriculum and coaching student-athletes in conjunction with the regulations of The South Carolina High School League and its governing National Federation, as well as school facilities for Away Games and events.

During the course of my tenure as a high school teacher and coach (1988 - 2002) I had the privilege to supervise student-athletes before, during and following competition in the competitive and locker room areas of the following schools:

- Academic Magnet High School
- North Charleston High School
- Garrett High School / Garrett Academy of Technology
- R.B. Stall High School
- Wando High School
- Lincoln High School
- Middleton High School
- St. Andrew's High School
- West Ashley High School
- Baptist Hill High School
- St. John's High School

- 
- James Island High School
 - Burke High School
 - Ft. Dorchester High School
 - Summerville High School
 - Cross High School
 - Stratford High School
 - Goose Creek High School
 - Hanahan High School
 - Cainhoy High School
 - Berkeley High School
 - St. Stephen's High School
 - Macedonia High School
 - Timberland High School
 - St. George High School
 - Harleyville - Ridgeville High School
 - Beaufort High School
 - Hilton Head High School
 - Battery Creek High School
 - Allendale - Fairfax High School
 - Wade Hampton High School
 - Colleton County High School
 - Bishop England High School (former)
 - Bishop England High School (current)
 - Pinewood Prep High School
 - First Baptist High School
 - Porter Gaud High School
 - Evangel Christian High School
 - Northwood Academy
 - Holly Hill - Roberts High School
 - Swansea High School
 - Denmark - Olar High School
 - Branchville High School
 - East Clarendon High School
 - Scott's Branch High School
 - Loris High School
 - Camden High School
 - Manning High School
 - Newberry High School
 - Socastee High School
 - Mullins High School
 - Georgetown High School

- Choppee High School
- Andrews High School
- Kingstree High School
- Waccamaw High School
- Myrtle Beach High School
- North Myrtle Beach High School
- Aynor High School
- Cardinal Newman High School
- Irmo High School
- Lexington High School
- Orangeburg - Wilkinson High School

Administrative Experience

In 2002, while a Graduate Student in the School of Administrative Leadership at Charleston Southern University, I began my transition to Secondary School Administration. This portion of my career spanned eighteen years as follows:

- Wando High School (2002 - 2003) - Responsibilities as an Administrative Assistant at Wando High School included teaching Math, Personal Health, SAT Prep, BSAP Prep and providing administrative support relative to Student Attendance, Level 1 and 2 Discipline and facility renovation and initial construction.
- Colleton County High School (2003 - 2009) - Responsibilities as Assistant and Associate Principal included annual hiring, oversight and evaluation of 150 employees, 1,500 students and student-athletes, facility use, student discipline, student safety, budget, facility renovation and initial construction. As well, I supported all curriculum and academic initiatives inclusive of Regular Education, Career and Technical Education and Exceptional Education.
- Thunderbolt Career and Technology Center (2009 - 2010) - Responsibilities as Director included annual hiring, oversight and evaluation of 30 employees, 750 students and student-athletes, facility use, student discipline, student safety, budget, facility renovation and initial construction. As well, I supported all curriculum and academic initiatives inclusive of Regular Education, Career and Technical Education and Exceptional Education.
- St. John's High School (2010 - 2014) - Responsibilities as Principal included annual hiring, oversight and evaluation of 40 employees, 300 students and student-athletes, facility use, student discipline, student safety, budget, facility renovation and initial construction. As well, I supported all curriculum and academic initiatives inclusive of Regular Education, Career and Technical Education and Exceptional Education.
- West Ashley High School (2014 - 2019) - Responsibilities as Principal included annual hiring, oversight and evaluation of 30 employees, 750 students and

student-athletes, facility use, student discipline, student safety, budget, facility renovation and initial construction. As well, I supported all curriculum and academic initiatives inclusive of Regular Education, Career and Technical Education and Exceptional Education.

- The Cooper River Center for Advanced Studies (2019 - 2020) - Responsibilities as Director included initial construction, budget oversight, student recruitment and staffing for the school that opened in Fall, 2020.. As well, I supported all curriculum and academic initiatives inclusive of Regular Education, Career and Technical Education and Exceptional Education.

During the course of my Administrative Tenure in Secondary Education Leadership, I additionally had the opportunity to study school innovation, curriculum planning, school safety and implementation of best practices as follows:

- SCASA Summer Leadership (2003 - 2016)
- Harvard Institute of Educational Leadership (2012 - 2014)
- High Schools That Works National Conference (2012 - 2016)

During the course of my Administrative Tenure in Secondary Education Leadership, I additionally had the opportunity to evaluate schools and conduct site visits as follows:

- Swansea High School
- Nations Ford High School
- Dorchester Career School
- Cane Bay High School
- Ashley Ridge High School
- Blythewood High School
- Laurinburg Institute of Technology
- York Comprehensive High School
- Pickens County Career Center
- Dutch Fork High School
- Lexington Technology Center
- Anderson Career Center
- Lexington Two Innovation Center
- Lexington Five Center for Advanced Technical Studies
- Horry County Early College High School
- Horry County Academy for the Arts, Science & Technology
- Trident Technical College
- The College of Charleston
- The Citadel
- Charleston Southern University
- Clemson University
- The University of South Carolina

- The University of Alabama
- The University of North Carolina - Chapel Hill
- Metropolitan Nashville Public Schools of Innovation

During the course of my Administrative Tenure in Secondary Education Leadership, I additionally had the opportunity to study school innovation, curriculum planning, school safety and implementation of best practices as it relates to initial construction and renovation of facilities as follows:

- Construction Design and Planning of Wando High School (2001 - 2003)
- Construction Design and Planning of Colleton County High School (2007 - 2010)
- Construction Design and Planning of St. John's High School Weight room (2012)
- Renovation Design and Planning of West Ashley High School (2016 - 2019)
- Construction Design and Planning of The Cooper River Center for Advanced Studies (2017 - 2020)
- Construction Design and Planning of The West Ashley Center for Advanced Studies (2017 - 2020)

Experience Summary

During the course of my professional career (1988 - 2020), I held the responsibilities as outlined above to safely conduct teaching, coaching and administrative duties in accessible locker room facilities for an estimated 52,000 students ranging in age from 7-21 and countless numbers of adults. I conducted my work in coaching in the locker room facilities of at least 62 high schools and 6 colleges and universities. Finally, I participated as the lead educational expert on the initial construction or renovation of locker room facilities that presently exist in operation on the campuses of 6 different South Carolina High Schools and Career Centers after studying the best construction and safe operational implementation practices found in place at 24 currently operational school facilities and taught by leading educational experts from Harvard, Charleston Southern University, The College of Charleston and offered in conference by Southern Regional Education Board (SREB) and The South Carolina Secondary Schools Association (SCASA) and The South Carolina High School League (SCHSL).

Professional Trainings

Southern Regional Education Board (SREB)

South Carolina Association of Secondary Administrators (SCASA)

National Federation of High School Athletics (NFHS)

South Carolina High School League (SCHSL)

Lockerroom Facilities

I. Student Supervision

An important responsibility of all educators and coaches is the direct supervision of the students placed in the care of the school that employs them as professionals. It is incumbent upon the school to provide the educator with the necessary tools and time to complete both administrative and instructional tasks related to their responsibilities. Specifically as relates to this case, the school must provide the educators working in Physical Education and Athletics with office spaces in proximity to their student gathering areas in order to allow the educators to maintain either a direct line of sight or hearing for supervision of students in locker rooms, classrooms, gymnasiums and outdoor areas. Although not oversights by The South Carolina Office of School Facilities, the Diocese of Charleston has consistently constructed and maintained facilities in alignment with this office's annual recommendations.

Consistently throughout numerous facilities I have referenced above, locker rooms have been put in place as required by State Educational Regulations and in accord with State and Federal Law in order to provide students an area to change in to proper clothing for participation in Physical Education and Athletic Events, secure storage areas for their belongings, meeting areas for instruction and restroom and showering facilities for health and hygiene. The Educators working in these areas should ensure that direct supervision by the responsible adult is provided. These procedures related to locker room office spaces can often include, but are not limited to:

- Time limits for locker room use.
- Instructor location while students are present in the area (ex. In an office with doors open or blinds that can be opened to permit direct view of the locker room).
- Door locking procedures.

The school often emphasizes to staff to consistently supervise students in all areas to ensure safety and prevent prohibited acts and activities. These procedures related to locker room office spaces can often include, but are not limited to Requirements related to unobstructed windows in internal offices that afford views into locker room spaces

The school establishes a Student Code of Conduct in accordance with State and Federal Laws inclusive of defined violations and progressive discipline and annually reviews this with students. Staff are expected to establish class rules and procedures in conjunction with the Student Code of Conduct and to report students to administration for violations. Common violations frequently documented in school locker room areas that supervising staff often report due to their direct supervision include, but are not limited to:

- Harassment
- Bullying
- Horse Play
- Fighting
- Physical Assault
- Larceny
- Sexual Acts (Consensual)
- Sexual Acts (Non-Consensual)
- Drug Possession
- Drug Distribution
- Possession of Weapons (Guns, Knives, etc.)

The schools typically require staff to annually complete training involving student supervision and harassment as a part of their compliance. These trainings provide all employees a clear understanding that office spaces should be inclusive of two way windows to allow others to see and hear. Any conduct violations committed by staff in violation of this training are serious and often viewed as grounds for employee discipline, termination and legal sanction.

During my thirty years of service as a Physical Education Teacher, Coach and Administrator, I have experienced multiple safety violations by students and non-students in gymnasium and locker room areas. For example:

- In 1992 while teaching at R.B. Stall High School, I was on duty in the Boy's Locker Room Area while PE students prepared for class. Two boys got into a serious fight. Because I was in close proximity, injuries were minor.
- In 1994 while coaching at Cross High School, non-students came on campus after school, entered the gymnasium and attacked several basketball players. One non-student brandished a pistol and fired it several times across the gymnasium. As my office was internal to the locker room and included a window, I was able to gather players in the locker room, lock the door from the inside and call authorities while maintaining supervision of all players in my charge.
- In 1997 while teaching at Garrett Academy, a male student dropped a large knife from his pants while changing after class while I was on duty in the

Locker Room Area. Because I was in proximity, I saw this occur and safely secured the weapon and its possessor.

- In 2000 while teaching at R.B. Stall High School, I was on duty in the Boy's Locker Room Area and witnessed a student run out of the Boy's Locker Room, dropping a loaded pistol as he ran from his waistband. I was able to safely secure the weapon and identify the student.

These events were consistent with actions of students and staff while under my administrative supervision as a principal in Colleton and Charleston County School Districts. Thus, I am extremely experienced with the aforementioned supervision violations that occur on campuses and the paramount importance for proper adult supervision in locker room areas.

II. Student Safety

Locker rooms typically are viewed as safe areas for students and staff within school safety planning due to the following:

- Single points of entrance that can be secured.
- No external windows.
- Load bearing walls.
- Internal water supply and bathroom facilities.
- Internal office spaces inclusive of phones, computers and internet.

During instances of hazardous weather or security breaches involving lockdowns, students and staff are to use these areas to shelter in place until it is safe to return to outer areas. Given that sheltering in place can last for extended periods of time, it is critical that office areas have doors and windows internal to the locker room so that staff and students can mutually see and hear each other.

III. Student Instruction

Locker room areas are often instructional gathering points for teams prior to, during and after athletic events. Typically, educators use these areas to provide student-athletes instruction through lessons taught verbally and visually using technology and wipe boards. Training staff often conduct injury assessments, and administer assistance in these areas to student-athletes. Given space, internal offices provide points of access for phone communication, technology connection and first aid treatment areas while maintaining sight lines for supervision during instructional times and while students are changing clothes. Like traditional academic classrooms, educators should never leave students unsupervised by an adult while under the care of the school.

Conclusion

In the era of the 1990s, school construction and renovation became laser focused on student safety and supervision due to horrific On-Campus tragedies such as Columbine High School in Colorado. Educators and architects were charged by stakeholders to make certain facilities afforded safe zones, while also allowing for supervision of all students at all times while on campus. When the facility here in question was constructed (1998), it is evident the stakeholders were consistent with these expectations due to the design employed, found in similar South Carolina Schools built in this era by other Design Teams separate and apart from The Diocese of Charleston and LS3P.

I have had numerous opportunities since 1998 to enter the Bishop England Locker Room areas as a coach. After careful review of the floor plan, statements provided in deposition by representatives of LS3P, the Constitution of The SCHSL, the "Guidelines for School Construction" published by The South Carolina Office of School Facilities and best professional practices for safety and supervision of high school locker rooms recommended by The National Federation of High Schools and the National Education Association, I have rendered the following conclusions germane to the locker room facilities of Bishop England High School:

- The Design Team inclusive of architects, engineers, principal and athletic staff created a safe, secure locker room space for Physical Education Students and Student-Athletes to use for changing clothes, securing belongings and accessing restroom and shower facilities.
- The 2018- 2019 Faculty Handbook outlines specific Locker Room Operational procedures for Physical Educators and Coaches to employ in order to properly supervise students in this area and afford them privacy.
- The School, at additional construction expense specifically for student safety and supervision, invested in internal Administrative Office windows, with blinds, to allow staff the ability to hear and possibly view student behaviors in the locker room. These windows were built in plain sight of those who entered the locker room prior to facility use and blinds were maintained in a closed position to further respect students.
- The students in the changing area were not in plain sight from hallways through additional door windows given narrow dimensions, observation angles and changing locations.


It should be understood that locker rooms consistently include the following components:

- Temporary Lockers capable of safely securing belongings.
- Changing Benches in proximity to lockers.
- Toilet Facilities.
- Shower Facilities.

It has been my professional observation as an educator over the past thirty years, that **students use all four areas to change clothes**. Although Showers are often required in the construction of locker rooms, students **very rarely** use them for this purpose, but rather for changing areas that afford more privacy. I have had student-athletes do so of their own choice in this very locker room. I have also witnessed this strategy in use by my own students in Physical Education Classes. Further, I have witnessed the most modest students choose to change in locker room bathroom stalls that afforded them seclusion and privacy from anyone else. These student choices are common in most school populations with similar aged clientele.

According to the National Federation of High School (NFHS), "As is reflected in the court cases and administrative agency complaints filed each year, unsupervised or inadequately supervised locker rooms have become 'ground zero' for a disproportionately high percentage of the physical injuries and other forms of harm suffered by student-athletes." The NFHS asserts that, "No single strategy could be employed by athletic programs to more effectively improve safety than ensuring that locker rooms are always supervised in a manner so that an adult can instantly respond to any incident that occurs."

Given the information I have independently reviewed, it is my professional conclusion that the locker room areas of Bishop England High School as originally constructed inclusive of internal office spaces with internal windows were in accord with the operational requirements of schools, consistent with best practices for student safety and supervision and in common with numerous other facilities at fellow high schools constructed in South Carolina in the 1990s. The design afforded staff and students the opportunity to be mutually aware of their presence for supervision and safety. It afforded the staff the ability to conduct administrative duties and class / team responsibilities while simultaneously supervising students. It provided students restroom facilities in which to conduct hygiene related activities in private stalls not visible from the Administrative Office. The school clearly expresses in numerous ways, both written and in action, that student safety and supervision are paramount as evidenced in the Faculty Handbook and written communication for Physical Education Classes distributed by teachers to parents at the start of each academic semester. It is my professional conclusion that Bishop



England High School's Locker Room Facility as originally constructed met all the required needs for student safety, supervision and educational purposes in accordance with the school's established mission.

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Deposition of:

Male Student

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Gary Nestler, et al
v.
The Bishop of Charleston, a Corporation Sole, Bishop
England High School, et al

Case #: 2:21-cv-00613-RMG

October 4, 2021

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Male Student - 10/4/2021

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1 A. Yes, my classmates.

2 Q. How many people would have been in
3 there?

4 A. Fifteen to twenty.

5 Q. Did you ever see anybody holding a
6 cell phone in the locker room?

7 A. Yes.

8 Q. How often was that?

9 A. Scarce.

10 Q. Why is that?

11 A. Because B.E. did not allow cell
12 phones.

13 Q. Did anybody ever take a picture in the
14 locker room?

15 A. No.

16 Q. Did you notice the windows that are in
17 the locker room?

18 A. Yes.

19 Q. Describe them for me, please.

20 A. I can't tell you the size. I don't
21 remember the dimensions by fact, but it was a
22 window that went from one office into the locker
23 room with blinds, like the blinds that are in
24 this office.

25 Q. Uh-huh. Did you ever see the blinds

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Male Student - 10/4/2021

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1 open?

2 A. No.

3 Q. Did you ever go in the coaches' office
4 on the other side?

5 A. No.

6 Q. Did you ever see anyone inside the
7 office looking into the locker room?

8 A. At times.

9 Q. And who did you see?

10 A. But not often. Kenny or Rooney (ph).
11 It was Rooney's office.

12 Q. And that's Coach Cantey?

13 A. Yes.

14 Q. The football coach?

15 A. Yes.

16 Q. How did you see him, were the blinds
17 open?

18 A. I could see the -- I could see that
19 the light was on in the office. And when I would
20 leave the locker room, I would see someone was in
21 the office.

22 Q. So you didn't see them looking into
23 the office from the locker room?

24 A. No.

25 Q. Did you ever see anybody else in one

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Male Student - 10/4/2021

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1 of the two offices on the boys' side?

2 A. No.

3 Q. Did you ever go on the girls' side,
4 the other side of the gym?

5 A. No.

6 Q. When you saw either Coach Cantey or
7 Coach Rooney sitting in the coaches' office, were
8 you walking down the hall and looking in the
9 window that's in the door?

10 A. The door would be open if I were to
11 have seen them.

12 Q. Okay. Did the door stay open when you
13 were in the office?

14 A. Well, the door was majority --
15 majority of the time it was open when closed into
16 the office.

17 Q. Okay. Did you ever see anyone in the
18 office with the door closed?

19 A. Very scarcely or scarcely.

20 Q. And from the hallway, did you ever --
21 was there ever a time when you could look into
22 the locker room from the hall through the
23 coaches' doorway?

24 A. I never did, so I wouldn't know.

25 Q. Did you ever see anybody else in the

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Male Student - 10/4/2021

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1 coaches' offices other than Rooney and Cantey?

2 A. Maybe after school some of the
3 football players or the basketball players, but
4 during P.E., no.

5 Q. Did you ever observe somebody staring
6 through the window in the door to the coaches'
7 office?

8 A. Can you repeat the question?

9 Q. Sure. Did you ever see somebody
10 staring into the coaches' office from the hallway
11 with you being in the locker room?

12 A. No.

13 Q. Did you ever complain to anybody about
14 the presence of the windows in the locker room?

15 A. No.

16 Q. And the windows were open and obvious,
17 would you agree with me?

18 A. The windows, what do you mean by,
19 "open and obvious"?

20 Q. You could see if they were there?

21 A. Yeah.

22 Q. And it was obvious that they were
23 windows?

24 A. Yeah.

25 Q. And it was obvious that the windows

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Male Student - 10/4/2021

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1 were opening into or from the coaches' office,
2 right?

3 A. Yeah, into the locker room.

4 Q. And it's not like these windows were a
5 two-way mirror where if you were looking at it
6 from the locker room, if it would reflect back at
7 you, but somebody on the other side could look
8 in?

9 A. No.

10 Q. And it wasn't concealed in any way,
11 was it?

12 A. Concealed by which means?

13 Q. It was hidden?

14 A. No, it was not hidden, in plain sight.

15 Q. Will you agree with me that given that
16 teenagers -- almost every teenager had a cell
17 phone at the -- when you were a student at B.E.
18 by that time?

19 A. Yes.

20 Q. And at any time they could have --
21 somebody else, some other student could have
22 taken a picture of people in the locker room?

23 A. Possibility, yes.

24 Q. When was the first time you expressed
25 concern that there were windows in the locker

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Male Student - 10/4/2021

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1 rooms?

2 A. When I heard about -- when I heard
3 about the Jeff Scofield incident.

4 Q. What did you hear about it?

5 A. My mother sent me a text because --
6 she sent me a text with the Live News, Live 5
7 News of the article of Jeff Scofield recording or
8 having footage of boys changing in the locker
9 room.

10 Q. Has anyone ever informed you that you
11 were photographed by any person, not just
12 Scofield, when you were changing clothes in the
13 locker room?

14 A. No, no one has informed me.

15 Q. What did you do when your mother told
16 you about Jeffrey Scofield's arrest?

17 A. I mean, I texted her back, but I had
18 emotions going through my head.

19 Q. What were those emotions?

20 A. Frustration, anxiety, feeling upset
21 for the kids who were -- who were known that they
22 were photographed or videotaped.

23 Q. Okay. What about the people who
24 weren't photographed?

25 A. I felt bad for them, as well.

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Male Student - 10/4/2021

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1 Q. Why?

2 A. Because they are living in a world of
3 they don't know, which, in some cases, can be
4 worse than knowing.

5 Q. But you also don't know whether
6 anybody else ever took a photograph in the locker
7 room, a student?

8 A. I do not.

9 Q. Does that give you anxiety?

10 A. That a student --

11 Q. Uh-huh.

12 A. -- videotaped or take a photo?

13 Q. Uh-huh.

14 A. Yeah, it gives me anxiety.

15 Q. Okay. What are you afraid of?

16 A. My videos -- photos of me or videos of
17 me being leaked of me, as well as students and my
18 fellow classmates, because as I can see, it was
19 something that was -- that happened when I was
20 there or after my fact. I mean, graduating.

21 Q. And do you know what happened to
22 Scofield's computer and phone and iPad?

23 A. I do. Well, I -- from what I heard
24 from the news, that's all I know.

25 Q. Okay. It's been taken by the attorney

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Male Student - 10/4/2021

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1 Q. You don't think the staff should be
2 able to monitor what the students are doing?

3 A. Not in the locker room, no.

4 Q. Even if they're fighting or bullying
5 or smoking?

6 A. At that point, someone can step out
7 and say and call for help, if needed. There just
8 shouldn't be a window there.

9 Q. Do you know whether there's a window
10 there or not now?

11 A. There's not, from what I've been told.

12 Q. How did you come to file this lawsuit?

13 A. My mother spoke to the Richters or the
14 Richters spoke to my mom. They asked to meet my
15 mom, and from there, they had a meeting, and then
16 my mother reached out to me and said that they
17 were looking -- that they would like to speak to
18 me, and then I spoke with them, and they informed
19 me, and from there, came.

20 Q. I'm not asking you anything your
21 lawyers told you.

22 A. Uh-huh.

23 Q. So what did your mother talk to The
24 Richter Firm about?

25 A. Just about the whole incident. She

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Male Student - 10/4/2021

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1 didn't really inform me much, just if I was
2 willing to meet with the lawyers.

3 Q. How did the Richters find your mother?

4 A. Most likely, after her -- after she
5 was in the incident with Bishop England.

6 Q. And that's when she got fired?

7 A. Are you talking about the incident?

8 Q. Yeah.

9 A. That I'm referring to?

10 Q. Yeah.

11 A. Yes.

12 Q. When she posted some -- reposted some
13 information favorable to abortion rights?

14 A. Sure.

15 Q. Okay. Do you know what happened in
16 her case that she brought?

17 A. Yes.

18 Q. What happened?

19 A. She shared something that had to deal
20 with rights of -- with regarding people taking
21 stances for human rights and she was fired
22 because it went against what the school taught or
23 what they said they taught.

24 Q. And she brought a lawsuit over that,
25 right?

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Male Student - 10/4/2021

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1 A. No, that's not public knowledge, to my
2 knowledge.

3 Q. So you're suing because of something
4 that might have happened, but you don't know
5 whether it did or not?

6 A. I think that's worse than knowing.

7 Q. What did you do to prepare for this
8 deposition?

9 A. I met with my lawyers.

10 Q. Do you know of any parents who were
11 aware of the windows in the locker room?

12 A. No.

13 Q. What about other students?

14 A. The students that were there, that
15 were part of the school that change in front of
16 the -- that changed in P.E., I'm sure they know
17 about the windows being there.

18 Q. Because they were obvious, right?

19 A. Yeah. Yes, sir.

20 Q. You couldn't miss them?

21 A. Huh-uh. No, sir.

22 Q. And at least you knew that the
23 coaches' offices were on the other side of that
24 window, right?

25 A. As well as my fellow classmates.

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Male Student - 10/4/2021

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1 C E R T I F I C A T E

2

3 STATE OF SOUTH CAROLINA)

4 COUNTY OF BERKELEY)

5

6 I, Nicole D. White, Certified Court
7 Reporter and Notary Public, State of South
8 Carolina at Large, certify that I was authorized
9 to and did stenographically report the foregoing
10 deposition of Male Student; and that the
11 transcript is a true record of the testimony given
12 by the witness, and was sworn as such.

13 I further certify that I am not a
14 relative, employee, attorney or counsel of any of
15 the parties, nor am I a relative or employee of
16 any of the parties' attorney or counsel connected
17 with the action, nor am I financially interested
18 in the action.

19 WITNESS MY HAND AND OFFICIAL SEAL this
20 13th day of October 2021.

21

22

23

24

25 My Commission expires September 8, 2027

Nicole D. White

Nicole D. White
Notary Public in and for the
State of South Carolina



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Deposition of:

Female Student

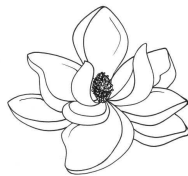
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Gary Nestler, et al
v.
The Bishop of Charleston, a Corporation Sole, Bishop
England High School, et al

Case #: 2:21-cv-00613-RMG

October 4, 2021

=====



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Female Student - 10/4/2021

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1 A. Yes.

2 Q. Did you play sports?

3 A. Yes.

4 Q. What sports did you play?

5 A. Cheerleading, soccer, and tennis.

6 Q. And when did you take P.E.?

7 A. My sophomore year.

8 Q. Did you ever encounter a man named
9 Jeffrey Scofield?

10 A. Yes.

11 Q. Tell me about that, please.

12 A. He would come into the classrooms to
13 fix the computers or the smart boards and I also
14 saw him throughout the hallways and in the
15 office.

16 Q. In the school's main office?

17 A. Yes.

18 Q. I'm gonna ask you now a series of
19 questions about the locker rooms at Bishop
20 England. You changed clothes in the locker room?

21 A. Yes.

22 Q. How often did that happen?

23 A. More times than I can count.

24 Q. Was there ever a time when you were
25 alone in the locker room when you were changing

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Female Student - 10/4/2021

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1 clothes?

2 A. Yes.

3 Q. How often did you -- how often did
4 that happen?

5 A. More times than I can count.

6 Q. How about how many times were you in
7 the locker room changing clothes with other
8 people present?

9 A. More times than I can count.

10 Q. And these were presumably only
11 students and only females, right?

12 A. Yes.

13 Q. How many people -- when others were in
14 the locker room with you while you changed
15 clothes, how many people would there normally be?

16 A. The amount that would be, I would say
17 20, over 20.

18 Q. Was anybody standing next to you while
19 you changed clothes, using the next locker?

20 A. Yes.

21 Q. And how often?

22 A. More times than I can count.

23 Q. At the time -- when you were in the
24 locker room, did you have a cell phone in your --

25 A. Yes.

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Female Student - 10/4/2021

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1 Q. Did it -- did almost everybody else,
2 to your knowledge, have cell phones in their
3 backpack or in their book bag?

4 A. Yes.

5 Q. Did you see the window into the girls'
6 locker room at any time when you were in there?

7 A. Yes.

8 Q. It wasn't a two-way mirror or
9 something? I mean, you saw it was there, right?

10 A. Yes.

11 Q. Could you see inside the coaches'
12 office on the other side of the window?

13 A. I don't remember.

14 Q. Were there blinds on the window?

15 A. Yes.

16 Q. Were they open or closed?

17 A. Closed.

18 Q. Did you ever see the blinds open?

19 A. I don't remember.

20 Q. Did you ever see anybody in the
21 coaches' office from the locker room?

22 A. Yes.

23 Q. When was that?

24 A. I'm sorry, could you repeat the
25 question?

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Female Student - 10/4/2021

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1 office while you were changing clothes since you
2 never saw anybody; is that right?

3 A. Yes.

4 Q. And you never observed anybody looking
5 through the window while you were changing
6 clothes, correct?

7 A. No.

8 Q. You did not see anybody?

9 A. No.

10 Q. Given that you were in the locker room
11 changing clothes with a bunch of other teenagers,
12 as we sit here today, are you concerned that
13 anybody else, any other students may have taken
14 pictures while you were changing clothes?

15 A. It's a possibility.

16 Q. I know, but are you concerned about
17 that?

18 A. No.

19 Q. Why not?

20 A. They were all my age, teenage
21 adolescent girls at the time.

22 Q. Are you worried that one of those
23 fellow students might post something on social
24 media about you?

25 A. Yes.

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Female Student - 10/4/2021

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1 A. I'm not sure who specifically.

2 Q. And what did your friends tell you?

3 A. That a girl in the grade above me had
4 found pictures taken on the iPad, the school iPad
5 that Jeffrey Scofield had owned and he took
6 pictures.

7 Q. Okay. Do you know whether he took
8 pictures of any girls?

9 A. I'm not sure.

10 Q. Has anyone alerted you that somebody
11 had taken pictures of you?

12 A. As of this moment, no.

13 Q. Do you know what happened to the iPad
14 and to Scofield's phone and computer?

15 A. No.

16 Q. Would it give you any comfort to know
17 that the South Carolina Attorney General's Office
18 has sequestered all those devices?

19 A. It doesn't comfort me. He still took
20 them and he had them.

21 Q. Right. But he doesn't have them
22 anymore and he doesn't have access --

23 A. He shouldn't have had them -- I'm
24 sorry.

25 Q. And he doesn't have access to them

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Female Student - 10/4/2021

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1 Q. Would you agree with me that anybody
2 who was not photographed while in the locker
3 rooms, would not have any cause of action to
4 bring, right?

5 MR. SOLOMON: Object to the
6 form.

7 BY MR. DUKES:

8 Q. You can answer.

9 A. No.

10 Q. Why? Why do you think that?

11 A. It could have been anyone.

12 Q. Okay. But it wasn't.

13 MR. SOLOMON: Object to the
14 form.

15 THE DEPONENT: It still could
16 have been. Just because it wasn't, doesn't
17 mean it couldn't have been anyone that was
18 in those locker rooms.

19 BY MR. DUKES:

20 Q. Right about that time, your mother got
21 terminated at Bishop England, didn't she?

22 A. Yes.

23 Q. Do you know what happened with that?

24 A. No.

25 Q. Do you know why she was terminated?

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Female Student - 10/4/2021

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1 A. The Richter Firm.

2 Q. How did you find the Richter Firm?

3 A. The Richter Firm found me.

4 Q. Okay. How did they find you?

5 A. They got in touch with my parents, who
6 gave them my phone number and e-mail, and they
7 got in touch with me asking if I would like to be
8 a part of this case, and I agreed.

9 Q. And when did they get in touch with
10 you about that?

11 A. About January of 2020.

12 Q. Prior to January of 2020, had you had
13 any contact with the Richter Firm?

14 A. No.

15 Q. What about, have you had any
16 contact -- prior to filing this lawsuit, had you
17 had any contact with a lawyer named Dan
18 Slotchiver?

19 A. No.

20 Q. What about Mr. Solomon whose smiling
21 face is on the screen?

22 A. No.

23 Q. What about Brent Halversen?

24 A. No.

25 Q. Do you know who Mr. Slotchiver,

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Female Student - 10/4/2021

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1 and how saddening an event that was.

2 Q. And what did Ms. Evans tell you?

3 A. Just to stay calm and that I'm almost
4 done with the year and that -- and as much as I
5 know I wasn't in the pictures, as of now that I
6 know and -- yeah, just that. I was almost done
7 with the year, so it was okay.

8 Q. Okay. And that's because you weren't
9 in any of the pictures?

10 A. Not that I know of.

11 Q. And nobody's provided you with
12 information saying you were photographed by
13 someone, right?

14 A. No.

15 Q. Nobody's told you that?

16 A. No.

17 Q. And throughout -- from 2016
18 through 2019, you were aware that those windows
19 were in the locker rooms, right?

20 A. Yes.

21 Q. They were obvious, I mean, you
22 couldn't miss them, correct?

23 A. Yes. Yes.

24 Q. Did you ever refuse to change clothes
25 in the locker rooms because those windows were

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Female Student - 10/4/2021

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1 C E R T I F I C A T E

2

3 STATE OF SOUTH CAROLINA)

4 COUNTY OF BERKELEY)

5

6 I, Nicole D. White, Certified Court
7 Reporter and Notary Public, State of South
8 Carolina at Large, certify that I was authorized
9 to and did stenographically report the foregoing
10 deposition of Female Student; and that the
11 transcript is a true record of the testimony given
12 by the witness, and was sworn as such.

13 I further certify that I am not a
14 relative, employee, attorney or counsel of any of
15 the parties, nor am I a relative or employee of
16 any of the parties' attorney or counsel connected
17 with the action, nor am I financially interested
18 in the action.

19 WITNESS MY HAND AND OFFICIAL SEAL this
20 13th day of October 2021.

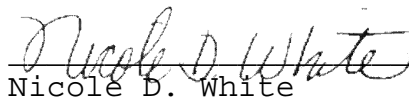
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25 My Commission expires September 8, 2027



Nicole D. White
Notary Public in and for the
State of South Carolina



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1 UNITED STATES DISTRICT COURT
2 DISTRICT OF SOUTH CAROLINA
3 CHARLESTON DIVISION

4 GARY NESTLER, : C/A NO.
5 VIEWED STUDENT FEMALE 200, : 2-21-cv-00613-RMG
6 VIEWED STUDENT MALE 300,
7 on behalf of themselves and
8 all others similarly situated, :

9 Plaintiffs

10 vs.

11 THE BISHOP OF CHARLESTON, a
12 Corporation Sole, BISHOP ENGLAND :
13 HIGH SCHOOL, TORTFEASORS 1-10, :
14 THE BISHOP OF CHARLESTON, in his
15 official capacity, and
16 ROBERT GUGLIELMONE, individually, :

17 Defendants

18 DEPONENT: ERIC AICHELE

19 DATE: OCTOBER 13, 2021

20 TIME: 9:00 a.m.

21 LOCATION: THE RICHTER FIRM, LLC

22 622 JOHNNIE DODDS BOULEVARD

23 MT. PLEASANT, SC

24 REPORTED BY: CAROL T. LUCIC, RPR, RMR

25 CLARK BOLEN COURT REPORTING & VIDEO CONFERENCING

CHARLESTON, SC 29405

843-762-6294

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1 MR. DUKES: Object to the form.

2 A. The intended purpose was to supervise the
3 locker rooms.

4 Q. That's not my question. The question is
5 what do you know about the guy sitting on this side
6 looking in at the students nude? You don't know
7 what is in his mind, do you?

8 MR. DUKES: Object to the form.

9 MR. STAIR: Object to the form.

10 A. I do not know. I don't even know who
11 those individuals would have been.

12 Q. We know this, who the persons are that
13 created the mechanism for persons to look at naked
14 children at Bishop England High School, and one of
15 those persons is you.

16 MR. STAIR: Object to form.

17 MR. DUKES: Object to form.

18 A. We designed the windows for supervision
19 reasons.

20 Q. What compelled that? What was the need
21 for windows looking into locker rooms for
22 supervision reasons?

23 MR. STAIR: Object to form.

24 A. It's my understanding that locker rooms
25 are places that you need to supervise to make sure

1 that bullying doesn't take place, fights don't
2 break out, vandalism doesn't occur, things such as
3 that. Schools generally do not like to have spaces
4 that students are in where they are not supervised
5 by an adult.

6 Q. The bathrooms are in the same category,
7 aren't they?

8 A. I would not say that bathrooms are
9 supervised.

10 Q. Why not?

11 A. Because there are codes in the plumbing
12 code and other general guidelines that say you
13 should not watch children at a toilet or a urinal.

14 Q. Why not?

15 A. Just for privacy reasons for the kids.

16 Q. How does the bathroom where someone is
17 urinating differ from the locker room where
18 somebody is completely nude and may walk across to
19 the urinals and urinate and walk right back twice
20 passing the windows?

21 MR. DUKES: Object to the form.

22 MR. STAIR: Object to the form.

23 A. I can't answer that question. I do know
24 that plumbing codes say that you should not be able
25 from a public area to see someone at a urinal or a

1 Q. So why have the windows?

2 A. Because there may be times when you do
3 want to monitor the locker room and you could open
4 the blinds.

5 Q. After you leave fixing the light fixture
6 in the room and either looking through the open
7 window that Runey is looking through or not the
8 fire marshal from the City of Charleston comes down
9 as he has a right and an obligation to do, and he
10 walks through this office. What precludes him from
11 looking at those naked children?

12 MR. DUKES: Object to the form.

13 MR. STAIR: Object to the form.

14 A. The only thing that would preclude that
15 would be the blinds.

16 Q. If they were closed?

17 A. Correct.

18 Q. Did you or didn't you say that would
19 defeat the viewing or monitoring I think was the
20 word you used ability that a plate glass window
21 would provide?

22 A. When they're closed, you would not be able
23 to see into the locker room.

24 Q. Let's assume that they're open for a
25 minute, and three boys who were bad boys come back

1 Q. What was his or her role?

2 A. She was a special needs or special
3 education teacher.

4 Q. In the public school system?

5 A. Correct.

6 Q. Here in Charleston County?

7 A. No; North Augusta. I'm not sure if that's
8 Aiken County or the county right next to Aiken.

9 Q. When we started talking a little while
10 earlier about how many schools in Charleston County
11 you had done, I don't remember the number that you
12 said. Do you recall?

13 A. I believe that I responded that the firm
14 had probably done 20 or more.

15 Q. So the firm believed it was a good idea to
16 view naked students. Is that what you're saying?

17 MR. DUKES: Object to the form.

18 MR. STAIR: Object to the form.

19 A. I don't know that the firm weighed in on
20 that decision, but I do know that the firm had
21 designed several locker rooms with view windows in
22 them.

23 Q. One guy got detected viewing these
24 children -- actually making a recordation, a phone
25 record of these children in various states of

1 referenced which you can't find the current copy
2 of, have you looked at any other materials in
3 preparation for your testimony today?

4 A. I'm trying to remember. I looked at the
5 Charleston County School District's website where
6 they post plans of their schools to see if this was
7 a common practice to put windows into locker rooms.

8 Q. Whose website?

9 A. Charleston County School District. I was
10 just curious to see if there were other schools
11 that had that. Many of the ones you mentioned do.

12 Q. Let me pursue that for a minute separate
13 from Bishop England High School. We went through
14 the listing a while ago when you almost entirely
15 said it was not you all work's. One case, West
16 Ashley, I think you said was you all's work.

17 I want to make sure we're clear on this.
18 I think I then asked you specifically about the
19 Bishop England thing and then maybe about the
20 public schools. The people on both sides, LS3P
21 people on one side, the school people or Diocese
22 people on the other side, and you answered I think
23 to say, yeah, we get together and we look at this.
24 Here is a round of drawings which is a step better
25 than the first round or however you characterize

1 project -- I called out the names of schools, and
2 that was the only one I think you said was LS3P.

3 A. I don't remember exactly all the ones you
4 called out, but West Ashley was on that list, yes.

5 Q. I can call it back up if you want to go
6 over the list again, but I'm certain you said as to
7 all the others that was not you all; it was
8 somebody else.

9 A. I remember you mentioned Stall, which was
10 not ours; Burke, which was not ours.

11 Q. North Charleston High School.

12 A. North Charleston was ours.

13 Q. And West Ashley was yours?

14 A. Yes.

15 Q. Do you remember the years for those two?

16 A. North Charleston, as I said, was finishing
17 construction when I joined the firm in '84, so I
18 would say sometime in the early '80s for North
19 Charleston. West Ashley started design in 1996, I
20 believe.

21 Q. You talked about going to a website and
22 looking around at the various schools from what I
23 understood you to be saying.

24 A. That's correct.

25 Q. Can you tell me if the schools that you

1 all did, North Charleston, Bishop England, West
2 Ashley, were those the first times -- and then I'm
3 going to ask you which one was the first time --
4 that you all drew in these viewing windows?

5 MR. STAIR: Object to the form.

6 MR. DUKES: Same objection.

7 A. I'm pretty sure that we had done it twice
8 before that on other schools not in Charleston
9 County necessarily.

10 Q. Where were those, do you know?

11 A. Battery Creek High School in Beaufort
12 County and Stratford High School in Berkeley
13 County.

14 Q. Do you happen to remember the dates of
15 those?

16 A. Battery Creek would have been in the late
17 '80s and Stratford was before my time, but it was
18 probably in the late '70s or maybe early '80s.

19 Q. Did you say as to Bishop England that the
20 blinds were spec'd or not?

21 A. I don't believe you asked me that. I did
22 check the specification. The blinds were
23 specified.

24 Q. By you all?

25 A. They were in our contract documents.

1 A. I do not know.

2 Q. If there are such mirrors available and if
3 as you have testified earlier in part of your
4 testimony looking through the viewing window in
5 Runey's office you could see all the way down to
6 the shower -- do you recall that testimony?

7 A. Right.

8 Q. -- I wonder if there is any reflective
9 danger from a mirror in a dressing room whereby
10 someone who is viewing nude students could utilize
11 a reflective device like a mirror for the purpose
12 of viewing them.

13 MR. STAIR: Object to the form.

14 MR. DUKES: Object to the form.

15 A. It would depend on where the mirrors are
16 located and the angles that you could see whether
17 it could be seen from what areas. The lavatories
18 were in a separate area of the locker area, and I
19 don't recall if there were mirrors anywhere else in
20 that locker area, if there were even mirrors in the
21 locker area.

22 Q. You said a moment ago you didn't know
23 whether they were even any in there.

24 Do you still think it's a good idea to put
25 these viewing windows such as we have been

1 discussing here today in offices of athletic staff
2 or other school staff to view students who change,
3 disrobe, in front of those windows?

4 MR. STAIR: Object to the form.

5 MR. DUKES: Object to the form.

6 A. All I can say is it seems to me to have
7 been a fairly common practice going back to the
8 1970s and even to current schools that have been
9 built. I would have to discuss it with my client
10 to understand their motivation and explain to them
11 what we have discussed today.

12 Q. In an ongoing way that's what you would
13 intend to do?

14 A. Correct.

15 Q. I understand. Let me see if I can help
16 you in that analysis a little bit by asking you
17 this question: Do you remember when you used to be
18 in a department store perhaps and you needed to
19 urinate and you walked over to the restroom area
20 and it said colored on one door and white on the
21 other? That went on for a long time, didn't it?

22 MR. STAIR: Object to the form.

23 MR. DUKES: Object to the form.

24 A. I don't remember seeing signs like that.

25 Q. You may be too young to have seen those.

1 CERTIFICATE OF REPORTER
2 STATE OF SOUTH CAROLINA
3 COUNTY OF CHARLESTON

4 I, Carol T. Lucic, Registered Professional
5 Reporter and Notary Public for the State of South
6 Carolina at Large, do hereby certify that the
7 witness in the foregoing deposition was by me duly
8 sworn to testify to the truth, the whole truth, and
9 nothing but the truth in the within-entitled cause;
10 that said deposition was taken at the time and
11 location therein stated; that the testimony of the
12 witness and all objections made at the time of the
13 examination were recorded stenographically by me
14 and were thereafter transcribed by computer-aided
15 transcription; that the foregoing is a full,
16 complete, and true record of the testimony of the
17 witness and of all objections made at the time of
18 the examination; and that the witness was given an
19 opportunity to read and correct said deposition and
20 to subscribe the same.

21 Should the signature of the witness not be
22 affixed to the deposition, the witness shall not
23 have availed himself/herself of the opportunity to
24 sign or the signature has been waived.

25 I further certify that I am neither
related to nor counsel for any party to the cause
pending or interested in the events thereof.

Witness my hand, I have hereunto affixed
my official seal on October 15, 2021, at
Charleston, Charleston County, South Carolina.

Carol T. Lucic
NCRA MERIT REPORTER
REGISTERED PROFESSIONAL REPORTER

My Commission expires: November 27, 2027.

=====

Deposition of:

Gary Nestler

=====

Gary Nestler, et al

v.

**The Bishiop of Charleston, a Corporation Sole, Bishop
England High School, et al**

Case #: 2:21-cv-00613-RMG

October 1, 2021

=====



Magnolia Reporting, LLC

P.O. Box 61011

North Charleston, SC 29419

(843) 303-9141

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Gary Nestler - 10/1/2021

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1 A. I'm not sure I can answer that
2 question.

3 Q. Was your daughter's education at B.E.
4 somehow objectionable or she didn't get a good
5 education?

6 A. Could you re-ask the question?

7 Q. Yeah. What is the problem with the
8 education that Bishop England provided your
9 daughter in the year and a half she attended?

10 A. I don't think it's a problem with her
11 education.

12 Q. Okay. Why did she move to Oceanside?

13 A. Because of the lack of a safe
14 environment being provided to her.

15 Q. Explain that to me.

16 A. She did not feel safe.

17 Q. Why is that?

18 A. You'd have to ask her directly.

19 Q. Did you alert Bishop England, anyone
20 at Bishop England that your daughter felt unsafe?

21 A. Yes, sir.

22 Q. Who?

23 A. Maryann Tucker, Patrick Finneran.

24 Q. And what did you tell them was unsafe
25 about the school?

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Gary Nestler - 10/1/2021

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1 MR. DUKES: Don't do speaking
2 objections anymore, Dan.

3 MR. SLOTCHIVER: All right.
4 Object to the form.

5 MR. DUKES: Object to the form.

6 BY MR. DUKES:

7 Q. Well, how were the people in the class
8 you purport to represent injured?

9 A. The same way that I feel that I was
10 injured.

11 Q. That their kids weren't provided a
12 safe environment to go to school?

13 A. That is correct.

14 Q. Okay. And your daughter was bullied
15 by other girls, by other teenage girls and have
16 issues with her volleyball coach, correct?

17 A. That is a correct statement.

18 Q. Okay. So how were the basketball
19 players impacted by Jim McClellan?

20 A. I can't say that they were impacted by
21 Jim McClellan.

22 Q. And how were the parents who didn't
23 have kids on the volleyball team impacted by Jim
24 McClellan's actions?

25 A. Again, it's not about Jim McClellan.

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Gary Nestler - 10/1/2021

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1 Q. Okay. Well, you identified for me the
2 safety issues that your daughter experienced and
3 why she didn't feel safe at Bishop England High
4 School and it was Jim McClellan, her volleyball
5 coach, and the fact that she was bullied by other
6 students.

7 MR. SLOTCHIVER: Object to form.

8 THE DEPONENT: That wasn't the
9 only reasons.

10 BY MR. DUKES:

11 Q. Okay. Well, tell me all of them.
12 What safety issues --

13 A. My daughter was also a student. As
14 you know, she was a student there.

15 Q. Right.

16 A. And part of her curriculum in playing
17 volleyball is they had to go into the locker
18 rooms and change.

19 Q. Right.

20 A. So because of what we now understand
21 the case to be, is that there was a window or
22 several windows that allowed for teachers or
23 coaches or whomever to look through where my
24 child was changing.

25 Q. Okay.

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Gary Nestler - 10/1/2021

Page 55

1 A. And that is not safe.

2 Q. Why not?

3 A. Because if my daughter is changing and
4 she's getting into her clothes, she has to take
5 off her uniform and change into her volleyball.

6 Q. You already testified that to your
7 knowledge, your daughter was never
8 surreptitiously or covertly photographed in the
9 locker room, was she?

10 A. Excuse me?

11 Q. You've already testified that to your
12 knowledge, your daughter was never photographed
13 or videoed while she was changing clothes in the
14 locker room, correct?

15 MR. SLOTCHIVER: Object to the
16 form.

17 THE DEPONENT: Covertly
18 photographed?

19 BY MR. DUKES:

20 Q. Yes.

21 A. I -- how would I absolutely,
22 positively, unequivocally know that she's been
23 photographed?

24 Q. You've never been told that she was
25 photographed? Nobody's ever provided you with a

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Gary Nestler - 10/1/2021

Page 89

1 C E R T I F I C A T E

2

3 STATE OF SOUTH CAROLINA)

4 COUNTY OF BERKELEY)

5

6 I, Nicole D. White, Certified Court
7 Reporter and Notary Public, State of South
8 Carolina at Large, certify that I was authorized
9 to and did stenographically report the foregoing
10 deposition of Gary Nestler; and that the
11 transcript is a true record of the testimony given
12 by the witness, and was sworn as such.

13 I further certify that I am not a
14 relative, employee, attorney or counsel of any of
15 the parties, nor am I a relative or employee of
16 any of the parties' attorney or counsel connected
17 with the action, nor am I financially interested
18 in the action.

19 WITNESS MY HAND AND OFFICIAL SEAL this
20 1st day of October 2021.

21

22

Nicole D. White
Notary Public in and for the
State of South Carolina

24

25 My Commission expires September 8, 2027

MAGNOLIA REPORTING, LLC (843) 303-9141
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

DEPOSITION OF MARY ANNE TUCKER

OCTOBER 5, 2021

GARY NESTLER, VIEWED STUDENT FEMALE 200, VIEWED
STUDENT MALE 300, on behalf of themselves and all
others similarly situated,

Plaintiffs,

vs. CASE NO. 2:21-cv-0613-RMG

THE BISHOP OF CHARLESTON, A CORPORATION SOLE;
BISHOP ENGLAND HIGH SCHOOL; TORTFEASORS 1-10; THE
BISHOP OF THE DIOCESE OF CHARLESTON, in his
official capacity; and ROBERT GUGLIELMONE,
Individually,

Defendants.

TIME: 12:51 PM

LOCATION: THE RICHTER LAW FIRM
MOUNT PLEASANT, SOUTH CAROLINA

REPORTED BY: RONDA K. BLANTON, RPR
CLARK & ASSOCIATES, INC.
CHARLESTON, SC 29422
843-762-6294
WWW.CLARK-ASSOCIATES.COM

1 restroom, why is that different from seeing
2 people in the locker room?

3 A. I don't know.

4 Q. Do you think it's a safe environment for
5 children to have to change before a viewing
6 window?

7 A. I think that having the viewing windows
8 there in case of a situation that was a fight,
9 something like that, that's where there's safety
10 in having those windows there.

11 Q. Are you today -- is Bishop England, not
12 you -- but as Bishop England today protecting the
13 students and providing them a safe place to be?

14 A. Yes. We do everything that we can to
15 provide them a safe place to be.

16 Q. And while the windows were in place, was
17 Bishop England providing the students a safe
18 place to be?

19 A. Yes.

20 Q. Then why did you change them?

21 A. Because once we found out about the
22 Jeffrey Scofield issue, we determined that those
23 windows were not the -- were not necessary and
24 needed to be covered up.

25 Q. Were not necessary?

1 CERTIFICATE OF REPORTER
2 STATE OF SOUTH CAROLINA
3 COUNTY OF HORRY

4 I, Ronda K. Blanton, a Registered
5 Professional Reporter and Notary Public for the
6 State of South Carolina at Large, do hereby
7 certify that the witness in the foregoing
8 deposition was by me duly sworn to testify to the
9 truth, the whole truth, and nothing but the truth
10 in the within-entitled cause; that said
11 deposition was taken at the time and location
12 therein stated; that the testimony of the witness
13 and all objections made at the time of the
14 examination were recorded stenographically by me
15 and were thereafter transcribed by computer-aided
16 transcription; that the foregoing is a full,
17 complete, and true record of the testimony of the
18 witness and of all objections made at the time of
19 the examination; and that the witness was given
20 an opportunity to read and correct said
21 deposition and to subscribe the same.

22 Should the signature of the witness not be
23 affixed to the deposition, the witness shall not
24 have availed himself/herself of the opportunity
25 to sign or the signature has been waived.

26 I further certify that I am neither related
27 to nor counsel for any party to the cause pending
28 or interested in the events thereof.

29 Witness my hand, I have hereunto affixed my
30 official seal on October 15, 2021, at Myrtle
31 Beach, Horry County, South Carolina.

32

33

34

35 Ronda K. Blanton
36 NCRA REGISTERED PROFESSIONAL
37 REPORTER, RPR
38 Notary Public,
39 State of South Carolina at Large
40 My Commission expires:
41 May 15, 2028.

42

43

Deposition of Patrick Finneran

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF SOUTH CAROLINA
3 CHARLESTON DIVISION

4 DEPOSITION OF PATRICK FINNERAN

5 OCTOBER 5, 2021

6 GARY NESTLER, VIEWED STUDENT FEMALE 200, VIEWED
7 STUDENT MALE 300, on behalf of themselves and all
8 others similarly situated,

9 Plaintiffs,

10 vs. CASE NO. 2:21-cv-0613-RMG

11 THE BISHOP OF CHARLESTON, A CORPORATION SOLE;
12 BISHOP ENGLAND HIGH SCHOOL; TORTFEASORS 1-10; THE
13 BISHOP OF THE DIOCESE OF CHARLESTON, in his
14 official capacity; and ROBERT GUGLIELMONE,
15 Individually,

16 Defendants.

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25
TIME: 9:10 AM

LOCATION: THE RICHTER LAW FIRM
MOUNT PLEASANT, SOUTH CAROLINA

REPORTED BY: RONDA K. BLANTON, RPR
CLARK & ASSOCIATES, INC.
CHARLESTON, SC 29422
843-762-6294
WWW.CLARK-ASSOCIATES.COM

1 Morals.

2 Q. And in a nurturing environment?

3 A. Yes, sir.

4 Q. Would you agree with me that if they are
5 viewed without knowing, they're being viewed in
6 the locker room, that that's not a safe
7 environment for them?

8 MR. DUKES: Object to the form.

9 A. I don't know if necessarily it's -- it's
10 the environment if one person does something.

11 Q. I'm not talking one person. If they can
12 be viewed by numerous people without knowing
13 they're being viewed, would you agree with me
14 that that's not a safe environment?

15 MR. DUKES: Object to the form.

16 A. I think our school is a very safe
17 environment, as you mentioned before, about only
18 so many instances in the locker room. So I would
19 say it's a safe environment.

20 Q. With the amount of reported -- that
21 wasn't my question though.

22 My question is: If students in a locker
23 room in various states of dress and undress can
24 be viewed without knowing they're being viewed
25 and they're minors, would you agree with me

1 A. Not that I recall.

2 Q. Were there any letters or communications
3 or announcements provided to the parents or
4 students giving them notice that the students
5 could be monitored in the locker rooms?

6 A. Not that I remember, no.

7 Q. Anything preventing the school from
8 putting a warning or a notice or sending
9 communication to the parents saying, "Hey, one of
10 the things you need to know of is that if there's
11 an incident in the locker room that we hear or
12 that gives us some concern, we reserve the right
13 and we may enter the locker room or look through
14 a window in the locker room and see your
15 children; and they may or may not be dressed"?

16 A. So your question is anything preventing
17 us from saying that?

18 Q. In saying that or having done that.

19 MR. DUKES: Object to the form.

20 A. No. There's nothing to prevent us from
21 informing the parents that there are windows.

22 Q. Do you believe that the students are
23 safe now in the locker rooms?

24 A. I mean, I -- they were safe before. So
25 I don't know if that safety's changed.

1 CERTIFICATE OF REPORTER
2 STATE OF SOUTH CAROLINA
3 COUNTY OF HORRY

4 I, Ronda K. Blanton, a Registered
5 Professional Reporter and Notary Public for the
6 State of South Carolina at Large, do hereby
7 certify that the witness in the foregoing
8 deposition was by me duly sworn to testify to the
9 truth, the whole truth, and nothing but the truth
10 in the within-entitled cause; that said
11 deposition was taken at the time and location
12 therein stated; that the testimony of the witness
13 and all objections made at the time of the
14 examination were recorded stenographically by me
15 and were thereafter transcribed by computer-aided
16 transcription; that the foregoing is a full,
17 complete, and true record of the testimony of the
18 witness and of all objections made at the time of
19 the examination; and that the witness was given
20 an opportunity to read and correct said
21 deposition and to subscribe the same.

22 Should the signature of the witness not be
23 affixed to the deposition, the witness shall not
24 have availed himself/herself of the opportunity
25 to sign or the signature has been waived.

26 I further certify that I am neither related
27 to nor counsel for any party to the cause pending
28 or interested in the events thereof.

29 Witness my hand, I have hereunto affixed my
30 official seal on October 15, 2021, at Myrtle
31 Beach, Horry County, South Carolina.

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Ronda K. Blanton
NCRA REGISTERED PROFESSIONAL
REPORTER, RPR
Notary Public,
State of South Carolina at Large
My Commission expires:
May 15, 2028.

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE STATE OF SOUTH CAROLINA
3 CHARLESTON DIVISION

4 DEPOSITION OF ROGER M. ATTANASIO
5 30(b)(6) LS3P ARCHITECTS
6 VOLUME 2

7 AUGUST 20, 2021

8 GARY NESTLER, VIEWED STUDENT FEMALE 200, VIEWED
9 STUDENT MALE 300, on behalf of themselves and all
10 others similarly situated,

11 Plaintiffs,

12 vs. CASE NO. 2:21-cv-0613-RMG

13 THE BISHOP OF CHARLESTON, A CORPORATION SOLE;
14 BISHOP ENGLAND HIGH SCHOOL; TORTFEASORS 1-10; THE
15 BISHOP OF THE DIOCESE OF CHARLESTON, in his
16 official capacity; and ROBERT GUGLIELMONE,
17 Individually,

18 Defendants.
19

20 TIME: 9:44 AM

21 LOCATION: RICHTER LAW FIRM
22 MOUNT PLEASANT, SOUTH CAROLINA

23 REPORTED BY: RONDA K. BLANTON, RPR
24 CLARK & ASSOCIATES, INC.
25 CHARLESTON, SC 29422
843-762-6294
WWW.CLARK-ASSOCIATES.COM

1 Q. Just so you can know where the case goes
2 and how it flows.

3 MR. STAIR: Object to the form.

4 Q. So your response as a 30(b)(6)
5 representative to the question whose idea was it
6 to put the window in -- windows plural in -- what
7 is your answer to that?

8 A. I do not know.

9 Q. And you've told us everything that
10 you've done to determine that; is that correct?

11 A. Well, I have looked at how many other
12 schools have windows between locker rooms and
13 coach's offices because I've been doing this for
14 35 years; and I recall the majority of those
15 locations have a window for security reasons.

16 Q. Majority of which locations?

17 A. Locker rooms and coach's office adjacent
18 to those lockers rooms.

19 Q. And you said for security purposes?

20 A. Yes, sir.

21 Q. And what is -- did those windows that
22 you're referring to -- you used the word
23 "majority." Do those windows that you're
24 referring to have blinds on them?

25 A. Sometimes, yes, sir.

1 which had a similar condition, yes, sir.

2 Q. Had a similar viewing condition?

3 A. Yes, sir.

4 Q. What school is that?

5 A. Fort Mill High School, I believe.

6 Q. And when did you learn of those windows
7 in Fort Mill High School?

8 A. Well, I can't say for sure because I
9 didn't go into Fort Mill; but, again, I've been
10 doing this for 35 years, and schools are designed
11 with the viewing window for security purposes.

12 Q. Who told you that?

13 A. It's just what we do. I mean, I -- I've
14 been on construction administration facilities
15 from middle schools and high schools where that
16 is a component of the design.

17 Q. It was here, wasn't it?

18 A. It was.

19 Q. And y'all made it up; and you put it in
20 the plans, didn't you?

21 A. Yes, sir.

22 Q. You thought it up; correct? You, LS3P,
23 thought it up?

24 MR. STAIR: Object to the form.

25 A. I don't know if that particular item was

1 MR. DUKES: Simply stating that I
2 object to the form of the question.

3 MR. RICHTER: Correct.

4 MR. DUKES: Yeah.

5 A. You're going to have to repeat the
6 question again. I'm sorry. I got distracted by
7 your comment.

8 Q. Question that I asked was this: "What
9 are the blinds intended to impart to the
10 students?"

11 MR. DUKES: Object to the form.

12 MR. STAIR: Object to the form.

13 A. Limiting view.

14 Q. So what are the students, then, to
15 believe when they go into the dressing room as
16 they must do for the PE transition that you've
17 talked about earlier? What are the students to
18 understand by the fact that the blinds appear
19 closed?

20 MR. STAIR: Object to the form.

21 MR. DUKES: Object to the form.

22 A. Our intent for the window was to allow a
23 supervisor to attempt to break up an activity
24 that was not supposed to occur in the dressing
25 room between students.

1 I would think that the window would let
2 the students know that I shouldn't be doing
3 anything other than changing clothes, getting to
4 class, and come back and change my clothes, get
5 back in my street clothes, and go. No horseplay.
6 The window was supposed to, maybe, give somebody
7 a -- an idea that I shouldn't -- shouldn't do
8 horseplay in this space.

9 Q. We're talking about the blind right now.
10 I asked you what the blinds were designed to say
11 to the students or impart to the students.

12 A. I don't -- I don't know if the -- I
13 don't know if there's an intent for what a
14 student should say about blinds. I don't -- I
15 don't recall. I don't know how to answer that
16 question.

17 Q. Well, what are blinds for?

18 A. Limiting view. Protecting from sun.

19 Q. Or obstructing view; correct?

20 A. Could be.

21 Q. You are not certain that blinds are
22 intended to obstruct view?

23 A. They could be used for that, yes, sir.

24 MR. DUKES: Object to the form.

25 Q. I just asked if you are saying that you

1 please.

2 BY MR. RICHTER:

3 Q. During this break did you discuss your
4 testimony with anyone?

5 A. No.

6 Q. Thank you.

7 I want to try to close -- start to say
8 close this blind discussion. I didn't mean to
9 make a play on words.

10 I'd like to try to close some circles
11 with you, please. We can tell better where we
12 are and what we need to do, make a reasonable
13 prediction.

14 Now, I'd like to clarify this, if we
15 can, if you can for us, please. Why do -- you
16 said some schools have windows. Some don't have
17 windows similar to the kind of thing that existed
18 at Bishop England. I take it that's what you
19 mean.

20 Is that what you mean?

21 A. I said all the schools that I've been
22 involved with have the window.

23 Q. All the schools that you've been
24 involved with have windows. Okay. And do they
25 all have blinds?

1 of the dinner, or whatever we're invited for, we
2 bring with us our two children, both sophomores
3 in high school at Bishop England High School, and
4 their two friends who are all having a sleep-over
5 at our house, and those two are juniors at Bishop
6 England High School.

7 Now we got four children present. Do
8 you agree with that?

9 A. Yes, sir.

10 Q. And all four of them go into the
11 bathroom at the same time. Do you need a window
12 to see what they're doing in there?

13 MR. STAIR: Object to the form.

14 MR. DUKES: Object to the form.

15 A. I don't believe so.

16 Q. Then why do you need one at Bishop
17 England High School?

18 MR. STAIR: Object to the form.

19 MR. DUKES: Same objection.

20 A. I don't have a window into the bathroom
21 at the Bishop England High School.

22 Q. You have a window into an area where
23 someone's nude body may be exposed, don't you?

24 MR. DUKES: Object to the form.

25 A. I have a window that allows viewing of

1 activities that could be detrimental to the
2 students, and we're trying -- the window's there
3 for security to try and prevent those unwanted
4 activities.

5 Q. And how many unwanted activities have
6 there been in the 21 years since Bishop England
7 opened its doors?

8 MR. DUKES: Object to the form.

9 MR. STAIR: Object to the form.

10 A. According to you, none.

11 Q. Whatever your source of information is,
12 you could have learned it from the Pope in Rome
13 as far as I'm concerned. How many are there?

14 MR. DUKES: Object to the form.

15 MR. STAIR: Object to the form.

16 A. I am not aware of any. I have not
17 searched for any. One could argue the window has
18 prevented it from occurring.

19 Q. One could argue that there had been none
20 because Bishop England either hasn't made any
21 record of any because they haven't occurred or
22 because the records are so horrible as to what
23 does occur in that bathroom.

24 MR. DUKES: Object to the form.

25 Q. That dressing room that they don't want

1 CERTIFICATE OF REPORTER
2 STATE OF SOUTH CAROLINA
3 COUNTY OF HORRY

4 I, Ronda K. Blanton, a Registered
5 Professional Reporter and Notary Public for the
6 State of South Carolina at Large, do hereby
7 certify that the witness in the foregoing
8 deposition was by me duly sworn to testify to the
9 truth, the whole truth, and nothing but the truth
10 in the within-entitled cause; that said
11 deposition was taken at the time and location
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25 to sign or the signature has been waived.

26 I further certify that I am neither related
27 to nor counsel for any party to the cause pending
28 or interested in the events thereof.

29 Witness my hand, I have hereunto affixed my
30 official seal on August 30, 2021, at Myrtle
31 Beach, Horry County, South Carolina.

32

33

34

35 Ronda K. Blanton
36 NCRA REGISTERED PROFESSIONAL
37 REPORTER, RPR
38 Notary Public,
39 State of South Carolina at Large
40 My Commission expires:
41 May 15, 2028.

42

43



Bigelow v. Syneos Health, LLC

United States District Court for the Eastern District of North Carolina, Western Division

August 27, 2020, Decided; August 27, 2020, Filed

No. 5:20-CV-28-D

Reporter

2020 U.S. Dist. LEXIS 155791 *; 2020 WL 5078770

ANDREA BIGELOW, individually and on behalf of all others similarly situated, Plaintiff, v. SYNEOS HEALTH, LLC, Defendant.

Core Terms

fail-safe, motion to dismiss, class action, promotion, retaliation, employees, quotation, certification, futile, employment action, alleges, merits, amend

Counsel: [*1] For Andrea Bigelow, on her own behalf and on behalf of those similarly situated, Plaintiff: Alexander Thomas Harne, LEAD ATTORNEY, Richard Celler Legal, P.A., Davie, FL; Edward Hallett Maginnis, Maginnis Law, PLLC, Raleigh, NC; Noah E. Storch, Ricahrd Celler Legal, P.A., Davie, FL.

For Syneos Health, LLC, Defendant: Joshua Wallace Dixon, LEAD ATTORNEY, Gordon & Rees, Charleston, SC.

Judges: JAMES C. DEVER III, United States District Judge.

Opinion by: JAMES C. DEVER III

Opinion

ORDER

On October 7, 2019, Andrea Bigelow ("plaintiff or "Bigelow") filed a class action complaint in the United States District Court for the Middle District of Florida against Syneos Health, LLC ("defendant" or "Syneos"), alleging both interference and retaliation in violation of the Family Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 et seq., and its implementing regulations [D.E. 1]. On January 23, 2020, the Middle District of Florida transferred the action to this district [D.E. 17]. On February 7, 2020, Syneos filed a partial motion to dismiss and to strike the class claims and a supporting memorandum [D.E. 20,21]. On March 13, 2020, Bigelow moved for leave to file an amended complaint and filed a supporting memorandum [D.E. 24,25]. On March 26, 2020, [*2] Syneos responded in opposition [D.E. 26]. As explained below, the court grants Syneos's partial motion to dismiss, dismisses Bigelow's FMLA interference claim, strikes Bigelow's class claims, and denies as futile Bigelow's motion to amend.

I.

Bigelow is a resident of St. Johns County, Florida. See Compl. [D.E. 1] ¶ 11. Bigelow telecommutes from her home in St. Johns County for her job as a Clinical Operations Lead at

Syneos. See id. at ¶¶ 10-11. Syneos is a "biopharmaceutical solutions organization" that employs 22,000 employees globally. W. at ¶¶ 8-9

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(quotation omitted). Bigelow has worked for Syneos since July 10, 2017, and reports to Syneos's headquarters in North Carolina. See id. at ¶¶ 10-11.

From April 1, 2019, through May 29, 2019, Bigelow used FMLA leave due to the birth of her child. See id. at 114. At the end of her FMLA leave, Bigelow "returned to work without consequence at that time, and commenced her job duties and responsibilities without issue." Id. at ¶ 15. In August 2019, Bigelow "discovered that [Syneos] promoted one of her male peers, who had not recently utilized FMLA, into a position of Senior Clinical Operations Lead." W. at ¶ 16. She believes that she was as qualified, if [*3] not more qualified, than this peer. See id. at ¶ 17. On August 30, 2019, Syneos management told Bigelow that, per company policy, employees are ineligible for promotions that occur during their FMLA leave. Id. at ¶ 19. According to Bigelow, Syneos management "corroborated that [Syneos] uniformly and negatively considered its employees' use of FMLA leave in making promotion decisions, pay decisions, and/or taking adverse employment actions against with regard to its employees." Id. at ¶ 20.

On September 9, 2019, Bigelow emailed Syneos management and asked management to describe other factors besides FMLA leave that led to her failure to receive a promotion. See id. at ¶24. On September 13, 2019, Bigelow and Syneos management met for a second time. See id. at ¶25. Syneos management confirmed Syneos's policy concerning FMLA leave and promotion. See id. at ¶ 26. Bigelow notified Syneos management "that it was illegal for management to use her FMLA against her as part of the promotion process." Id. at ¶27. On September 27, 2019, the Syneos's Human Resources Manager confirmed this policy. See id. at ¶ 28. On October 7, 2019, Bigelow filed suit. See id.

Bigelow makes two claims under the FMLA [*4] and asserts them as part of a proposed class action. First, Bigelow alleges FMLA interference because

Syneos negatively considered her FMLA leave in an employment decision. See id. at ¶¶ 43-48. Second, Bigelow alleges FMLA retaliation because Syneos considered her FMLA leave when it failed to promote her. See id. at ¶¶ 49-55. Bigelow seeks, inter alia, class certification, compensatory damages, liquidated damages, interest, reasonable attorneys' fees, and costs. See id. at 9.

II.

A motion to dismiss under Rule 12(b)(6) tests the complaint's legal and factual sufficiency. See Ashcroft v. Iqbal, 556 U.S. 662, 677-80, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554-63, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); Coleman v. Md. Court of Appeals, 626 F.3d 187, 190 (4th Cir. 2010), aff'd, 566 U.S. 30, 132 S. Ct. 1327, 182 L. Ed. 2d 296 (2012); Giarratano v. Johnson, 521 F.3d 298, 302 (4th Cir. 2008). To withstand a Rule 12(b)(6) motion, a pleading "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Iqbal, 556 U.S. at 678 (quotation omitted); see Twombly, 550 U.S. at 570; Giarratano, 521 F.3d at 302. In considering the motion, the court must construe the facts and reasonable inferences "in the light most favorable to the [nonmoving party]." Massey v. Ojaniit, 759 F.3d 343, 352 (4th Cir. 2014) (quotation omitted); see Clatterbuck v. City of Charlottesville, 708 F.3d 549, 557 (4th Cir. 2013V abrogated on other grounds by Reed v. Town of Gilbert, 576 U.S. 155, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015)). A court need not accept as true a complaint's legal conclusions, "unwarranted inferences, unreasonable conclusions, or arguments." Giarratano, 521 F.3d at 302 (quotation omitted); see Iqbal, 556 U.S. at 678-79. Rather, a plaintiffs factual allegations must "nudge[] [her] claims," [*5] Twombly, 550 U.S. at 570, beyond the realm of "mere possibility" into "plausibility." Iqbal, 556 U.S. at 678-79.

When evaluating a motion to dismiss, a court considers the pleadings and any materials "attached or incorporated into the complaint." E.I. du Pont de

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Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 448 (4th Cir. 2011); see *Fed. R. Civ. P. 10(c)*; *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016); *Thompson v. Greene*, 427 F.3d 263, 268 (4th Cir. 2005). A court may also consider a document submitted by a moving party if it is "integral to the complaint and there is no dispute about the document's authenticity." *Goines*, 822 F.3d at 166. Additionally, a court may take judicial notice of public records without converting the motion to dismiss into a motion for summary judgment. See, e.g., *Fed. R. Evid. 201*; *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007); *Philips v. Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009).

"The FMLA provides covered employees with two types of rights and protections." *Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541, 546 (4th Cir. 2006). First, the FMLA contains prescriptive protections that "set substantive floors for conduct by employers, and creating entitlements for employees." *Id.* (alteration and quotation omitted). For example, under the FMLA, "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period" for, *inter alia*, "the birth of a son or daughter of the employee and in order to care for such son or daughter." 29 U.S.C. § 2612(a)(1). Second, the FMLA "contains proscriptive provisions that protect employees from discrimination or retaliation for exercising their substantive rights." *Yashenko*, 446 F.3d at 546. [*6] Within its proscriptive provisions, the FMLA distinguishes between interference claims and retaliation claims. See *id.* at 546-51. Interference claims stem from section 2615(a)(1), which states that "[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter." 29 U.S.C. § 2615(a)(1); see 29 C.F.R. § 825.220(c). Retaliation claims, by contrast, originate from section 2615(a)(2), which states that "[i]t shall be unlawful for any employer to discharge or in any other manner discriminate against any individual

for opposing any practice made unlawful by this subchapter." 29 U.S.C. § 2615(a)(2). Specifically, "employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions." 29 C.F.R. § 825.220(c).

"To make out an 'interference' claim under the FMLA, an employee must thus demonstrate that (1) [s]he is entitled to an FMLA benefit; (2) [her] employer interfered with the provision of that benefit; and (3) that interference caused harm." *Adams v. Anne Arundel Cty. Pub. Sch.*, 789 F.3d 422, 427 (4th Cir. 2015); see *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89, 122 S. Ct. 1155, 152 L. Ed. 2d 167 (2002); cf., e.g., *Corbett v. Richmond Metro. Transp. Auth.*, 203 F. Supp. 3d 699, 709 (E.D. Va. 2016) (delineating a five-part test). "When the eligible employee returns from leave, he or she must 'be restored by the employer to the position of employment held by the employee when the leave commenced,' [*7] or 'be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.'" *Anderson v. Sch. Bd. of Gloucester Cty., Virginia*, No. 3:18CV745, 2020 U.S. Dist. LEXIS 94645, 2020 WL 2832475, at *29 (E.D. Va. May 29, 2020) (unpublished) (quoting 29 U.S.C. §§ 2614(a)(1)(A) and 2614(a)(1)(B)).

As for the first factor, the parties agree that Bigelow was entitled to FMLA leave. In fact, Bigelow received FMLA leave from April 1, 2019, through May 28, 2019, "returned to work without consequence at that time, and commenced her job duties and responsibilities without issue." Compl. at ¶¶ 14, 15. As for the second factor, Bigelow has not plausibly alleged that Syneos "interfered with the provision of that [FMLA leave] benefit." *Adams*, 789 F.3d at 427; *Corbett*, 203 F. Supp. 3d at 709-10. Syneos cannot interfere with Bigelow's FMLA leave if she has taken the FMLA leave that she was entitled to take. See *Anderson*, 2020 U.S. Dist. LEXIS 94645, 2020 WL 2832475, at *29; *Downs v. Winchester Med. Ctr.*, 21 F. Supp. 3d 615, 619 (W.D. Va. 2014); see also *Seeger v. Cincinnati Bell*

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Tel. Co., LLC, 681 F.3d 274, 283 (6th Cir. 2012); *Campbell v. Costco Wholesale Corp.*, No. 3:12-CV-00306, 2013 U.S. Dist. LEXIS 131316, 2013 WL 5164635, at *5 (M.D. Tenn. Sept. 12, 2013) (unpublished).

As for the third factor, Bigelow has not plausibly alleged that she suffered harm from Syneos's interference, even assuming such interference occurred. See Compl. at ¶¶ 8-34. Syneos restored Bigelow to the same position that she held when the leave commenced: Clinical [*8] Operations Lead. See 29 U.S.C. § 2614(a)(1)(A). Any harm that Bigelow suffered came after her leave, not before it. Thus, the proper claim to remedy Bigelow's alleged harm concerning the promotion is not an FMLA interference claim, but an FMLA retaliation claim. See, e.g., *Conoshenti v. Pub. Serv. Elec. & Gas Co.*, 364 F.3d 135, 146 n.9 (3d Cir. 2004), modified by *Erdman v. Nationwide Ins. Co.*, 582 F.3d 500 (3d Cir. 2009); *Dotson v. Pfizer, Inc.*, 558 F.3d 284, 294-95 (4th Cir. 2009); *Sumner v. Mary Washington Healthcare Physicians*, No. 3:15-CV-42, 2015 WL 3444885, at *6 (E.D. Va. May 28, 2015) (unpublished); *Downs*, 21 F. Supp. 3d at 617-18. Accordingly, Bigelow has not plausibly alleged an FMLA interference claim. Thus, the court dismisses count one.

III.

Syneos has moved to strike Bigelow's class action claims in count one (i.e., FMLA interference) and two (i.e., FMLA retaliation). See [D.E. 20]. The court has dismissed count one for failure to state a claim under *Rule 12(b)(6)*. Thus, the court analyzes the class action claims concerning count two.

Federal Rule of Civil Procedure 12(f) allows a court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." *Fed. R. Civ. P. 12(f)*. *Federal Rule of Civil Procedure 23(c)(1)(A)* provides that "[a]t an early practicable time after a person sues or is sued as a class representative, the

court must determine by order whether to certify the action as a class action." *Fed. R. Civ. P. 23(c)(1)(A)*. "Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly [*9] encompassed within the named plaintiffs claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the [class] certification question." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982).

Generally, when viewing *Rule 12(f)* and *Rule 23* in tandem, courts rarely make a class determination at the pleading stage. See, e.g., *Williams v. Potomac Family Dining Grp. Operating Co., LLC*, No. GJH-19-1780, 2019 U.S. Dist. LEXIS 181604, 2019 WL 5309628, at *5 (D. Md. Oct. 21, 2019) (unpublished); see, e.g., *Letart v. Union Carbide Corp.*, No. 2:19-CV-00877, 2020 U.S. Dist. LEXIS 97542, 2020 WL 2949781, at *2 (S.D. W. Va. June 3, 2020) (unpublished); *Alig v. Quicken Loans Inc.*, No. 5:12-CV-114, 2015 U.S. Dist. LEXIS 194450, 2015 WL 13636655, at *3 (N.D. W. Va. Oct. 15, 2015) (unpublished). However, "a motion to dismiss a complaint's class allegations should be granted when it is clear from the face of the complaint that the plaintiff cannot and could not meet *Rule 23*'s requirements for certification because the plaintiff has failed to properly allege facts sufficient to make out a class or could establish no facts to make out a class." *William*, 2019 U.S. Dist. LEXIS 181604, 2019 WL 5309628, at *5 (alteration and quotation omitted). Although a plaintiff retains the burden of proving class certification, a court analyzes a pre-discovery challenge to class certification under "the familiar standard of review for motions to dismiss under *Rule 12(b)(6)*." *Id.*

Syneos seeks to strike the class claims and argues that Bigelow improperly [*10] alleges a "fail-safe" class. See [D.E. 21] 9-11; [D.E. 26] 6-7. A fail-safe class is one that "is defined so that whether a person qualifies as a member [of the class] depends on whether the person has a valid claim." *EOT Prod. Co. v. Adair*, 764 F.3d 347, 360 n.9 (4th Cir.

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2014) (quoting *Messner v. Northshore Univ. HealthSvs.*, 669 F.3d 802, 825 (7th Cir. 2012)).

Fail-safe classes are considered improper for two reasons. First, in a fail-safe class, "a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment." *Messner*, 669 F.3d at 825. Hence, fail-safe classes "fail to provide the resolution of the claims of all class members that is envisioned in class action litigation." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012).

Second, fail-safe classes do not comply with *Rule 23*. See *Fed. R. Civ. P. 23*. Specifically, *Rule 23* requires that members of a proposed class be readily identifiable, a principle called "ascertainability." *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 655 (4th Cir. 2019). "Under this principle,... a class cannot be certified unless a court can readily identify the class members in reference to objective criteria." *Id.* (quotations omitted). In certifying a class, however, a court may not "conduct a preliminary inquiry into the merits of a suit." *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974). Specifically, "class litigation should not move forward when a court cannot identify class members without 'extensive and individualized fact-finding or mini-trials.'" [*11] *Krakauer*, 925 F.3d at 658. (quoting *EOT Prod. Co.*, 764 F.3d at 358). Because a fail-safe class requires a court to inquire into the merits of the underlying case to identify the members of the class, fail-safe class definitions violate these principles. See, e.g., *Chado v. Nat'l Auto Inspections, LLC*, No. JKB-17-2945, 2019 U.S. Dist. LEXIS 75392, 2019 WL 1981042, at *4, (D. Md. May 3, 2019) (unpublished).

Although the Supreme Court has not addressed the fail-safe class question, nearly every circuit court of appeals to address the question considers fail-safe classes improper. See, e.g., *Orduno v. Pietrzak*, 932 F.3d 710, 716-17 (8th Cir. 2019); *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1276-77 (11th Cir. 2019); *McCaster v. Darden Rests., Inc.*, 845 F.3d

794,799-800 (7th Cir. 2017);¹*Torres v. Mercer Canyons, Inc.*, 835 F.3d 1125, 1138 n.7 (9th Cir. 2016); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 22 & n.19 (1st Cir. 2015); *Byrd v. Aaron's, Inc.*, 784 F.3d 154, 167 (3d Cir. 2015); *Randleman v. Fidelity Nat'l Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011); but see *In re Rodriguez*, 695 F.3d 360, 370 (5th Cir. 2012) ("our precedent rejects the fail-safe class prohibition"). Additionally, numerous treatises discuss the impermissibility of fail-safe classes. See, e.g., 7A Wright & Miller, Fed. Prac. & Proc. § 1760 & n.14.55 (discussing how the Third Circuit and "[o]ther courts... have ruled that requiring fail-safe classes for certification is improper"); Herr, Annotated Manual for Complex Litig. § 21.222 ("The order defining the class should avoid ... terms that depend on resolution of the merits."); 1 Rubenstein, Newberg on Class Actions § 3:6 ("Class definitions that require a court to decide the merits of prospective individual class members' claims to determine class membership—sometimes referred to as 'fail-safe' classes—may also [*12] run afoul of the definiteness requirement.").

Bigelow's proposed class is an impermissible fail-safe class. Bigelow frames her proposed class as:

Any and all employees who worked for Defendant during the relevant limitations period who were denied promotions, pay increases, and/or suffered any adverse employment action, as a result of her/his/their prior or anticipated use of protected FMLA leave during her/his/their employment.

Compl. at ¶ 3. This class definition turns on whether the employee has a valid claim, and "[t]hat

¹ The *McCaster* court addressed a fail-safe class in the employment context. In *McCaster*, the Seventh Circuit held that a class definition that "sought to represent a class of '[a]ll persons separated from hourly employment with [Darden] in Illinois between December 11, 2003, and the conclusion of this action[] who were subject to Darden's Vacation Policy . . . and who did not receive all earned vacation pay benefits" was impermissible because the class definition "plainly turn[ed] on whether the former employee ha[d] a valid claim." 845 F.3d at 799.

is a classic fail-safe class." *McCaster*, 845 F.3d at 799. To illustrate, if plaintiff fails to prove (1) that a particular employee experienced adverse promotion, pay, or employment actions or (2) that Syneos took such actions because the employee used or planned to use FMLA leave, then Syneos is entitled to a judgment in its favor with respect to that employee. Cf. Compl. at 13. The court, however, could not enter a judgment against that particular employee because that employee would no longer fit the class definition. See *McCaster*, 845 F.3d at 799; *Young*, 693 F.3d at 538; *Messner*, 669 F.3d at 825; *Genenbacher v. Century Tel Fiber Co. II*, 244 F.R.D. 485, 487-88 (C.D. El. 2007). Bigelow's fail-safe class defines itself based on legal conclusions and impermissibly [*13] constitutes "a class that cannot be defined until the case is resolved on its merits." *Young*, 693 F.3d at 538; see *Willrinson v. Greater Dayton Reg'l Transit Auth.*, No. 3:11-CV-247, 2017 U.S. Dist. LEXIS 131643, 2017 WL 3578702, at *7 (S.D. Ohio Aug. 17, 2017) (unpublished). A fail-safe class action leaves a defendant in a "heads, I win ... tails, I can sue again" situation, contravening the truism that class actions should "resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011) (emphasis added). Accordingly, the court strikes Bigelow's class action claim in count two.

IV.

Bigelow has moved for leave to file an amended complaint. See [D.E. 24]. *Federal Rule of Civil Procedure 15* states that "[a] party may amend its pleading once as a matter of course." *Fed. R. Civ. P. 15(a)(1)*. "In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." *Fed. R. Civ. P. 15(a)(2)*. "[L]eave to amend a pleading should be denied only when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile." *Johnson v. Oroweat*

Foods Co., 785 F.2d 503, 509 (4th Cir. 1986); see *Foman v. Davis* 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). "A proposed amendment is... futile if the claim it presents would not survive a motion to dismiss." *Save Our Sound OBX, Inc. v. N Carolina Dep't of Transp.*, 914 F.3d 213, 228 (4th Cir. 2019); see *Perkins v. United States*, 55 F.3d 910, 917 (4th Cir. 1995).

Bigelow's proposed amended [*14] complaint is futile. It adds nothing material to the court's analysis concerning either the FMLA interference claim or the class action claim. Instead, Bigelow has proposed only minor changes such as alleging that "Plaintiff did not, in fact, return to work without consequence from her FMLA leave," including a citation to *29 C.F.R. § 825.220(c)*, and asserting that "Defendant utilizes the taking of and/or FMLA leave as a negative factor in employment actions " Am. Compl. [D.E. 24-1] ¶¶ 29, 30, 33. As for whether Bigelow returned to work without consequence, the court has considered that issue in ruling on the motion to dismiss. As for *29 C.F.R. § 825.220(c)*, the court has considered the regulation in its ruling. As discussed, the regulation informs Bigelow's FMLA retaliation claim, not her FMLA interference claim. See, e.g., *Seeger*, 681 F.3d at 283; *Conoshenti*, 364 F.3d at 146 n.9; *Downs*, 21 F. Supp. 3d at 617-18. As for whether Syneos considers FMLA as a negative factor, the court has already assumed the veracity of this allegation and considered it in ruling on the motion to dismiss. Accordingly, the court denies Bigelow's motion to amend as futile.

V.

In sum, the court GRANTS defendant's partial motion to dismiss, DISMISSES WITH PREJUDICE plaintiff's FMLA interference claim, STRIKES [*15] WITHOUT PREJUDICE plaintiff's class claims [D.E. 20], and DENIES as futile plaintiff's motion to amend [D.E. 24].

SO ORDERED. This 27 day of August.

/s/ James C. Dever III

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2020 U.S. Dist. LEXIS 155791, *15

JAMES C. DEVER III

United States District Judge

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**United States District Court
District of South Carolina
Charleston Division**

Gary Nestler,
Viewed Student Female 200,
Viewed Student Male 300,
on behalf of themselves and all others
similarly situated,

Plaintiffs,

vs.

The Bishop of Charleston, a Corporation
Sole, Bishop England High School,
Tortfeasors 1-10, The Bishop of the Diocese
of Charleston, in his official capacity, and
Robert Guglielmone, individually,

Defendants.

C/A: 2-21-cv-00613-RMG

**PLAINTIFFS' REPLY TO
DEFENDANTS' OBJECTION TO
PLAINTIFF' MOTION FOR CLASS
CERTIFICATION**

Come now Plaintiffs by and through their undersigned attorneys, and file this their Reply to Defendants' Objection to Plaintiffs' Motion for Class Certification, and state the following in response thereto:

I. Defendants argue that the Plaintiffs lack standing.

Plaintiffs' standing is based upon established caselaw and they need not show they were actually filmed to establish an injury in fact. Defendants cite to U.S. Supreme Court case of TransUnion LLC v. Ramirez 141 S. Ct. 2190 (2021) as "a very similar situation" to the plaintiffs in TransUnion. However, TransUnion is factually distinguishable as a data breach case where the mere risk of future harm from inaccurate credit reporting alerts in class members' credit files did not constitute a sufficiently concrete injury, and that the risk of future harm was too remote. *Here* Plaintiffs allege they were *already* harmed by having their privacy rights actually invaded- an

injury in fact under state law. The school has admitted to the blanket monitoring of their students in the locker rooms. The school also conceded, in Principal Finneran's testimony, that the monitoring of the students when they were unaware would constitute an invasion of privacy and is thus is not a safe, moral or nurturing environment. In TransUnion, the Supreme Court distinguished the risk of future harm (as alleged in TransUnion) from traditional types of torts (as alleged here) where there is concrete injury in fact. The TransUnion Court expressly declared that the tort of intrusion upon seclusion is a concrete injury in fact. Id. at 2204.

Plaintiffs allege wrongful intrusion into private affairs, an invasion of privacy tort. This cause of action has been provided in South Carolina law for at least sixty years and is defined as, **“the wrongful intrusion into one's private activities, in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities.** Meetze v. Associated Press, 230 S.C. 330, 335, 95 S.E.2d 606, 608 (1956)(Emphasis added); Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P., 385 S.C. 452, 458, 684 S.E.2d 756, 759 (2009)(“[t]he common law right of privacy provides protection against four distinct categories of invasion: (1) intrusion upon a plaintiff's seclusion or solitude, or into his private affairs”). South Carolina law holds that if the Plaintiff proves the four elements of the tort, **“the fact of damage is established as a matter of law. The amount of damage is then to be assessed by the trier of fact.”** Snakenberg v. Hartford Cas. Ins. Co., 299 S.C. 164, 172, 383 S.E.2d 2, 6 (Ct. App. 1989)(Emphasis added).

Testimony cited in Plaintiffs' Motion establishes that Defendants were viewing the children through the coaches'/school officials' offices directly into the changing rooms¹ in the

¹ Defendants argue they were not viewing children into the bathroom areas adjacent to the changing rooms because there was no direct line of sight from the coaches' offices into the bathroom areas, suggesting the school was respecting privacy in the bathroom areas but ignoring the children's privacy expectation in the directly viewable changing rooms. The fact that certain areas of the locker room the school recognizes are private- where the children are naked- and that there are other areas where the children are naked where there is no privacy interest to be protected are logically incongruent. Moreover, courts have held that persons are entitled to a reasonable expectation

name of safety- it was conceded and admitted. These windows exposed every single student in the locker room to unreasonable and intrusive observation. (Exhibit #1 to Amended Complaint).

Under Snakenburg, “An intrusion may consist of watching, spying, prying, besetting, overhearing, or other similar conduct.” Id. The Defendants repeatedly argue in their Objection (without legal citation) that the Plaintiffs needed -and failed to show- that students were actually viewed, or alternatively, photographed or videotaped while changing in order to have a claim against Defendants. Such arguments have consistently been refused by Courts across the country when considering invasion of privacy claims².

The LS3P architect, Attansio, conceded that the viewing windows equipped *with* blinds *operated as a peephole*. There is no requirement that Plaintiffs prove the tortfeasor’s actual act of invading someone’s privacy. If this were so, it would disembowel the tort as it would be nearly impossible to redress the tortfeasor’s actions because of the activity’s inherently clandestine nature. South Carolina Courts held in Snakenburg, “the fact of damage is established as a matter of law” once the elements of the tort are met. “[T]he ‘[f]act of damage pertains to the existence of injury, as a predicate to liability; actual damages involve the quantum of injury and relate to the appropriate measure of individual relief.’ Tillman v. Highland Indus., Inc., No. 4:19-CV-02563-SAL, 2021 WL 4483035, at *12 (D.S.C. 2021). [A]s long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied. In re Nexium Antitrust Litig., 777 F.3d 9, 32 (1st Cir. 2015).

The second prong is established because the changing rooms were private. All deposed conceded that students should have a reasonable expectation of privacy in the Bishop England

of privacy outside of toilet stalls. *See, e.g. Soliman v. Kushner Companies, Inc.*, 433 N.J. Super. 153, 162, 77 A.3d 1214, 1220 (App. Div. 2013).

² See Footnote 4 in Plaintiffs’ Motion for Certification for citations of authority.

locker rooms. The third prong under Snakenburg requires that the harm complained of be substantial and unreasonable, rather than a mere annoyance. Even the Defendant's media spokesperson, Ms. Aselage, testified that she would not want to be viewed while naked and unaware to merely ease safety concerns, and presumably nor would anyone else. (Dep. M. Aselage, Vol, III, P. 89, L. 8 – P. 91, L. 22).³ Principal Finneran testified that the if the students were viewed by school staff without their knowledge, it would not be a safe environment. Under South Carolina law, wrongful intrusion into one's private activities is an invasion of privacy tort that is committed in such a manner, "[a]s to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities. Meetze v. Associated Press, 230 S.C. 330, 335, 95 S.E.2d 606, 608 (1956)(Emphasis added). Plaintiffs' expert psychiatrist Dr. Salas testified that the invasion of privacy on the students caused harmful class-wide mental effects.

As to the final prong under Snakenburg, intentionality, the standard is simply, "that the actor acted willingly (volition) and that he knew or should have known the result would follow from his act. Neither deliberation nor purpose nor motive nor malice are necessary elements of intent." Snakenberg, 383 S.E.2d at 7. There is no question as to whether Defendants' actions were intentional. Testimony cited in the Plaintiffs' Motion makes it clear that the Defendants purposefully installed and used the windows and blinds to monitor the children while undressing in the changing areas of the locker rooms, without consideration for students' privacy interests.⁴

II. Defendants argue that Aselage's testimony is inadmissible and should not

³ Some states, such as Florida, have enacted criminal statutes for viewing persons in dressing rooms where there is a reasonable expectation of privacy. Importantly, the statute makes no distinction between visual observation and video recordation: Fla. Stat. Ann. §877.26: Direct observation, videotaping, or visual surveillance of customers in merchant's dressing room, etc., prohibited; penalties.— (1) It is unlawful for any merchant to directly observe or make use of video cameras or other visual surveillance devices to observe or record customers in the merchant's dressing room, fitting room, changing room, or restroom when such room provides a reasonable expectation of privacy.

⁴The school did however, as mentioned in Plaintiffs' Motion, institute a policy of knocking on bathroom doors in the 2018-2019 school year, an acknowledgment by the Defendants of the children's right to privacy and that safety can be ensured without school personnel monitoring children nude or partially nude.

be considered.

Aselage's testimony is admissible under F.R.E 801(d)(2) as party admissions. Ms. Aselage testified she had no personal knowledge about allegations of the lawsuit. (Dep. M. Aselage, Vol. I, P. 26, L. 4-7). Further, Aselage testified that the secretary of communication, Michael Aquilano, and the Diocese General Counsel, Elaine Fowler, gave her the content with which to prepare the media statement which stated the purpose of the windows. (Dep. M. Aselage, P. 28, L. 18-23). Aselage represented to this Court that during her contractual obligations, she was in direct contact with the Diocese's General Counsel, Elaine Fowler, and other high-ranking administrators of the Diocese to prepare for external communications with secular media and the parents of Bishop England students. (Aselage Motion for Protection, Dkt. No. 43). With that background in mind, Ms. Aselage's third deposition was taken on December 1, 2021 after her motions for protective order were denied by the Court. At the deposition, Aselage repeatedly answered that *the source of her knowledge and testimony came exclusively from statements and communications made by Diocese officials / employees*⁵. Accordingly, the content of her testimony being a direct account from the Diocese constitute admissions of a party under F.R.E 801(d)(2) and thus is admissible testimony for the Court and, ultimately, a jury to consider.

III. Defendants argue the Brannum case is not applicable because there is no Fourth Amendment application to Bishop England as a non-public school.

Plaintiffs' citation and reliance on Brannum is solely confined to that Court's interpretation

⁵ The explanation that the windows were for safety came from the Diocese: "Is it your understanding that the reason that's been given to you by the Diocese is, safety? A. Yes." (Dep. M. Aselage, Vol. III, P. 30, L. 15 -P. 31, L. 7). Aselage was told the windows were installed was for safety and monitoring. (Dep. M. Aselage, Vol. III, P. 35, L. 7-13) (Emphasis added). All the persons Aselage spoke with prior to the filing of the lawsuit were Diocese employees. (Dep. M. Aselage, Vol. III P. 14, L. 1 - P. 15, L. 1). The knowledge Aselage has about the windows being installed for safety was through speaking to Ms. Fowler, Ms. Tucker, Mr. Finneran, the Vicar General, and Mr. Aquilano (Dep. M. Aselage, Vol. III P. 63, L. 15-22). The testimony from Aselage that the children's privacy being invaded was completely preventable- was from knowledge gleaned from talking to Ms. Fowler, Ms. Tucker, Mr. Finneran, Mr. Aquilano and the Vicar General. (Dep. M. Aselage, Vol. III, P. 79, L. 18- P. 80, L. 2).

of children's expectations of privacy in a locker room setting. Plaintiffs cite Brannum as authority that there is a reasonable expectation of privacy for children in a locker room setting. Any considerations of the Fourth Amendment, or state action, which Defendants misconstrue to be Plaintiffs' intention in implementing the citation, are irrelevant to whether a student has a reasonable expectation of privacy in a locker room setting.

The Defendants' own reference and comparison to other *public* schools in the area that have viewing windows in their locker rooms underscores that there is no distinction between privacy expectations at private versus public school locker rooms. Moreover, under South Carolina law, there is nothing required in proving the tort of invasion of privacy under South Carolina law that would call into question the status of the school as being public or private as a relevant factor to decide whether elements of the tort of invasion of privacy are met. As set forth above, the Plaintiffs have met the elements of the invasion of privacy tort under Snakenburg and have met the elements on a class-wide basis because all students that attended Bishop England that were required to use the locker rooms to disrobe and change clothes. The fact that the viewing occurred in a private versus public school setting does not change the privacy expectations of the students in the locker room. The Defendants conceded in their testimony that Bishop England students had reasonable expectation of privacy in their locker rooms.

IV. Defendants argue Class members cannot be identified.

Defendants assert that the Plaintiffs have proposed a "fail-safe" class. A 'fail-safe' class is a class that cannot be defined until the case is resolved on its merits." Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 538 (6th Cir. 2012). To the contrary, the Plaintiffs' Class is objectively definable as all students that attended Bishop England during the relevant time frame. The case does not need to be litigated first in order to determine whom was affected- all students were

exposed to the same harm. This was alleged in the Complaint. The U.S. Supreme Court has held that: “An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof. [citation omitted]. When “one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members [citation omitted]. Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453–54, 136 S. Ct. 1036, 1045, 194 L. Ed. 2d 124 (2016).

Applying this law to the facts of this case, it is indisputable that common to all class members is the fact that students were being monitored while they were changing clothes. The monitoring of the students was done surreptitiously. Because all students were exposed to the same harm, adjudication by representation is preferable as the issue of unwanted exposure is common to all students that attended Bishop England High School from 1998 through 2019. “A single common question will suffice [citation omitted] but it must be of such a nature that its determination “will resolve an issue that is central to the validity of each one of the claims in one stroke.” EQT Prod. Co. v. Adair, 764 F.3d 347, 360 (4th Cir. 2014). All students used the same locker rooms, and all had their privacy invaded the same way, without any safety justification, causing outrage as well as mental harm to a person of ordinary sensibilities as testified to by Dr. Salas. The only question to be resolved is the amount of damages to be assessed by the trier of fact. “Rule 23(b)(3) is normally satisfied where there is an essential common factual link, such as standardized documents and practices, even though the nature and amount of damages may differ

among class members.” In re TD Bank, N.A. Debit Card Overdraft Fee Litig., 325 F.R.D. 136, 154 (D.S.C. 2018).

V. Defendants argue Plaintiffs need necessity of proof that parents relied on safety representations which entails individualized determinations of reliance.

Representations made to parents on a uniform and class-wide basis do not require individualized showings of reliance. Defendants have admitted that parents of the Bishop England students were never told their children were being monitored. Indeed, Bishop England advertised and held itself out to the Tuition Class payers as a moral, caring and safe environment and that it would, “seriously curb the possibility of child sexual abuse happening in our parishes and schools.” (See Plaintiff’s Motion, Exhibit #19). The Principal conceded that it was not a safe or nurturing place when children were observed nude without their knowledge. Because *safety* is what the school represented to every parent, including Nestler, it is not necessary to make individual inquiries for a class-wide determination that the representation was made and relied upon. See, e.g., Moyle v. Liberty Mut. Ret. Ben. Plan, 823 F.3d 948, 964–65 (9th Cir. 2016), as amended on denial of reh’g and reh’g en banc (Aug. 18, 2016)(“[w]here the defendant’s representations were allegedly made on a uniform and classwide basis, individual issues of reliance do not preclude class certification. See *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir.1992) (“We emphasize that the defense of non-reliance is not a basis for denial of class certification.”)).

VI. Defendants argue that Plaintiffs have proposed no reliable model for determining class-wide damages.

At the class certification stage, all that is required is a showing under F. R. Civ. P. 23 for numerosity, commonality, typicality and adequacy as well as one of the Rule 23(b) factors, and not a showing that, “damages are capable of measurement on a class-wide basis,” as stated on page

20 of the Defendants' Objection.⁶ The Plaintiffs assert they have made the requisite showing in their Motion. As to the Rule 23(b)(3) predominance test, the Plaintiffs have shown that the use of the windows operated on a class wide basis, and the invasion of privacy claim makes the matter susceptible to a class wide determination as "the fact of damage is established as a matter of law," under Snakenburg.

Dr. Salas has given a medical opinion that, "Every student who was subjected to undressing before the viewing windows is expected to be impacted," and have a psychological damage. This is consistent with the tort under Snakenburg that, "*the damage consists of the unwanted exposure resulting from the intrusion.*" It should be noted that claims of invasion of privacy and sexual exploitation have been dealt with on a class-wide basis, with simple models for determination of damages. For example, the Court in In re USC Student Health Ctr. Litig., No. 218CV04940SVWGJS, 2019 WL 3315281, at *1 (C.D. Cal. June 12, 2019) granted settlement approval of \$215 million for of a class of 4,000 to 17,000 women, whose identities were ascertainable through USC's records or through self-identification for a physician's alleged sexual misconduct toward female patients at the USC student health center. In submitting the case for approval, the Plaintiffs proposed a three-tiered system for the class members to decide how to

⁶ See Comcast Corp. v. Behrend, 569 U.S. 27, 41, 133 S. Ct. 1426, 1436, 185 L. Ed. 2d 515 (2013)(Ginsburg and Breyer, JJ., dissenting opinion)("While the Court's decision to review the merits of the District Court's certification order is both unwise and unfair to respondents, the opinion breaks no new ground on the standard for certifying a class action under Federal Rule of Civil Procedure 23(b)(3). In particular, the decision should not be read to require, as a prerequisite to certification, that damages attributable to a classwide injury be measurable " 'on a class-wide basis.'"). Parker v. Asbestos Processing, LLC, No. 0:11-CV-01800-JFA, 2015 WL 127930, at *14 (D.S.C. 2015)("[t]he Defendants read too much into the Comcast decision. It does not stand for the proposition that all of the Plaintiffs' damages must be calculated on a class-wide basis. It merely indicates that the "methodology" for measuring and quantifying damages be the same for all class members so as to satisfy the predominance requirement. Comcast, 133 S.Ct. at 1433. Here, the methodology for both actual damages and, assuming the fiduciary duty claim is viable, disgorgement, is the same for all class members. The mathematical computation of the actual damages, of course, is different. And, the Fourth Circuit has made it clear that Rule 23 "explicitly envisions class actions with ... individual damage determinations.").

select their compensation while simultaneously affording the class members their privacy. The Settlement's claims process was simple by design—no action for Tier 1, a simple claim form for those to tell their story in Tier 2, and a simple claim form and provide an interview for Tier 3 to be evaluated by a Special Master in conjunction with expert review. In re USC Student Health Ctr. Litig., Case 2:18-cv-04258-SVW-GJS, Dkt.# 67 (C.D. Cal. June 12, 2019). In re USC Student Health Ctr. Litig. demonstrates that there are methodologies which provide victims of torts compensation that have an inherently psychological component of damage.

VII. Defendants argue that the statute of limitations defense would require individualized inquiry.

Plaintiffs and Class Members could not be aware they were being monitored through the windows⁷ until it was brought to light in May of 2019 that the windows were not only be used to monitor⁸ them (see Finneran letter to parents), but also used by school employee Scofield for his own perverted ends. Accordingly, the date of the letter to parents, May 7, 2019, is the date students, parents and the greater school community were put on actual and/or constructive notice the of their possible cause of action. The standard as to when the limitations period begins to run is objective rather than subjective. Therefore, the statutory period of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor. *See Allwin v. Russ Cooper Assocs., Inc.*, 426 S.C. 1, 13, 825 S.E.2d 707, 713 (Ct. App. 2019). Defendants further assert that the discovery rule is not applicable on a class-wide basis. However, the discovery rule is an objective standard and can be applied on a class-wide basis. *See In re TD Bank, N.A. Debit Card Overdraft Fee Litig.*, 325 F.R.D. 136, 172 (D.S.C. 2018)("[t]o the extent the discovery rule applies, an objective standard ("reasonably ought

⁷ It is the Defendants themselves that have asserted that the blinds were always closed. (Dep. M.A. Tucker, P. 26, L. 22 - P. 27, L. 13; Dep. P. Finneran, P. 19, L. 10-11).

⁸ *See* Finneran letter to parents dated May 7, 2019, Exhibit #3 to Amended Complaint.

to have been discovered") can be utilized to determine when class members had constructive knowledge, if not actual knowledge, that a cause of action had accrued.").

VIII. The Defendants argue the standard of care for construction of schools.

On October, 28, 2021, Defendants disclosed two (2) experts: Myles Glick and William L. "Lee" Runyon, III. (See Dkt #49). The filing and attachments, however, are flawed and fail to comply with the Court's Scheduling Order requiring identification and disclosure of expert reports, as well as the requirements of Fed.R.Civ.P 26(a)(2)(B). Specifically, Defendants failed to disclose the report of Myles Glick in a timely manner. Defendants did file, as Dkt# 49-1, a 41 page exhibit including a cover page entitled "Bishop England Site Visit 10/15/20, Myles Glick, AIA LEED AP" followed by 40 pages of photographs of the BEHS gym/locker room area. Defendants did not comply with Rule 26(a)(2)(B) by failing to disclose all required and aforementioned information other than the name and rate of compensation of the purported expert.⁹

While the Defendants have attempted to "back door" the report into the record by filing the same as an exhibit to Defendants' Opposition to Plaintiffs' Motion for Class Certification (See ECF 75-3), this is procedurally improper and is violative of the Court's Order and Federal Rules of Civil Procedure. Accordingly, Defendants' expert Myles Glick should be disregarded and stricken. Notwithstanding the procedural deficiency of the Glick report, and without waiving Plaintiffs' aforementioned position, Glick' report fails substantively. Expert testimony must be reliable in order to be admitted into evidence under Rule 702, Fed.R.Evid. Defendants' experts

⁹ Defendants failed to disclose to Plaintiffs as required by the Courts' Order and Rule 26 "a complete statement of all opinions the witness will express and the basis and reasons for them", "the facts or data considered by the witness in forming them", "any exhibits that will be used to summarize or support them", "the witness's qualifications, including a list of all publications authored in the previous 10 years", and "a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition". Failed to provide the School Design Standards for the Albuquerque Public Schools and the Guidelines for School Facilities in Virginia's Public Schools, as cited on page 1 of Glick's report. Defendant's further failed to provide Glick's qualifications and publications from the last 10 years, as well as all other cases in which Glick has testified as an expert at trial or deposition in the last 4 years, all as required by the rules.

cannot satisfy this basic reliability requirement. Defendants' experts point to no study, research, or publication they have either conducted or relied upon which show any form of proven or trusted analysis pertaining to viewing windows in schools. Further, Glick's expert report fails the analysis set forth in Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 2790, 125 L. Ed. 2d 469 (1993). Daubert sets forth five factors concerning reliability: (1) whether a theory or technique relied on by the expert can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publications; (3) the known or potential rate of error; (4) whether there are standards controlling the operation of the theory or technique; and (5) whether the theory or technique enjoys general acceptance within a relevant scientific community. See Daubert, 509 U.S. at 592-594.

Glick is presumably a licensed and credentialed architect, however Plaintiffs were not provided with information regarding Glick's background, education, or credentials. According to the report of Myles Glick, he "conduct[ed] an investigation to determine if the design and installation of a window in the coaches' offices violate any standard of care."¹⁰ Noticeably absent are any AIA¹¹ design standards for school construction, nor any ASTM building or construction standard for school construction. Instead, Glick relies upon the "School Design Standards for the Albuquerque Public Schools", the "Guidelines for School Facilities in Virginia's Public Schools", and the school design guidelines as stated in "GearBoss"¹², which appears to be a document generated from the internet.¹³ There is no indication the documents Glick bases his support on

¹⁰ See Report of Myles Glick, p.1.

¹¹ The American Institute of Architects prides itself in "the power of design," for school safety. See <https://p2a.co/nqJI4o9>.

¹² According to their website, GearBoss is a company that "will help you with all aspects of your athletic program. From lockers, to storage, to equipment transport and fund-raising solutions, GearBoss products save you time, space, and effort. They're flexible and customizable." <http://www.gearboss.com/about.php>.

¹³ See Report of Myles Glick, p. 1-2.

have been peer reviewed or widely accepted by design professionals and thus these documents are unreliable. Further, Glick provides no basis or reliable methodology for how the tri-county area high schools named in his report were chosen, whether there are standards controlling, or the potential rate of error. Glick fails to address Defendants' use of the windows with blinds, and in particular, the type of blinds utilized, such blinds at issue in this case which enable the student to be monitored without their awareness. Among other reasons, the failure of Glick's report to even acknowledge this variable, renders the report unreliable. Essentially, Glick's states that some other schools have viewing windows from coaches' offices into their locker rooms. No expert opinion is needed for that. *See Nease v. Ford Motor Co.*, 848 F.3d 219, 229 (4th Cir. 2017); *Funderburk v. South Carolina Electric & Gas Company*, 395 F.Supp.3d 695, 706 (D.S.C. 2019) *citing Oglesby*, 190 F.3d at 250 ("With respect to reliability, the district court must ensure that the proffered expert opinion is 'based on scientific, technical, or other specialized knowledge and not on belief or speculation, and inferences must be derived using scientific or other valid methods.'").

Glick does not acknowledge that the viewing windows were situated directly in front of the lockers *where the children were made to undress* nor that the blinds were maneuverable by controls located inside the coaches' offices, thus allowing secretive use and access by whomever was in the office. In Plaintiffs' Motion, there was much deposition testimony that it could appear to the children that the blinds were closed; however, whomever was on the other side of the blinds could still view the children based on the positioning of the blinds, again rendering Glick's report unreliable under a *Daubert* analysis and in light of the requirements of Rule 702, Fed.R.Evid.

Additionally, Defendants' other expert, Lee Runyon, possesses no specialized knowledge, skill, training, or education that would qualify him as an "expert" under Rule 702. None is stated. Further, his report is not "the product of reliable principles and methods" that have been reliably

applied to the facts of the case, as required by Rule 702. Mr. Runyon's opinions, as alluded to in his own report, are nothing more than his own personal lay impressions of publicly accessible records and internet searches. *See Free v. Bondo-Mar-Hyde Corp.*, 25 F. App'x 170, 172 (4th Cir. 2002) (Court affirming exclusion of expert opinions that were based on his assumptions of what caused the can to explode rather than on scientific, technical, or other specialized knowledge.); *See also Oglesby*, 190 F.3d at 250 (stating a reliable expert opinion cannot be based on belief or speculation, but inferences must be derived using scientific or other valid methods). Mr. Runyon simply does not have any expertise to offer concerning the viewing windows and blinds. Accordingly, Mr. Runyon is not offering an "expert" opinion but rather an opinion of a lay witness. *See Kennedy v. Joy Technologies, Inc.*, 269 F. Appx. 302, 312 (4th Cir. 2008) (affirming exclusion of expert report that lacked any specific gloss, expertise, or specialized analysis). Mr. Runyon's report is therefore unreliable as well. It is not the result of any specialized knowledge. It contains no recognized method of testing his theories, and there are legitimate concerns as to the accuracy and reliability of Mr. Runyon's opinion. *See Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 200 (4th Cir. 2001) (affirming exclusion of expert when opinions amounted to a wholly conclusory finding based upon his subjective beliefs rather than any valid scientific method). *See also In re Titanium Dioxide Antitrust Litig.*, No. CIV.A. RDB-10-0318, 2013 WL 1855980, at *7 (D. Md. 2013) ("[e]xpert testimony is inadmissible when it addresses lay matters which [the trier of fact] is capable of understanding without the expert's help")(citation omitted). The expert report of Lee Runyon also substantively fails under a *Daubert* evaluation and is thus unreliable pursuant to Rule 702. One of the "goals" stated in Mr. Runyon's report is "[to] evaluate the reasonable design of the Bishop England High School Locker Room Facility." This goal in and of itself proves that the

report is unreliable, as Mr. Runyon has already arrived at his conclusion before conducting *any* analysis. His report is inherently unreliable.

IX. The negligent hiring claim is not susceptible to class-wide treatment.

Plaintiffs concede, and withdraw their Motion for Class Certification as to the cause of action for Negligent Hiring.

X. Defendants argue the Plaintiffs cannot establish adequacy of representation because of barratry.

The argument of barratry is both baseless and offensive and Plaintiffs vehemently deny it. Regardless, the allegation is not a basis to deny class classification.

Respectfully submitted,

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Attorneys for Plaintiffs

January 26, 2022
Mount Pleasant, South Carolina

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

CIVIL ACTION NUMBER: 2:21-cv-613-RMG

Gary Nestler, *et al*,

Plaintiffs,

V.

The Bishop of Charleston, a Corporation
Sole, *et al*,

Defendants.

DEFENDANTS' SURREPLY REGARDING CLASS CERTIFICATION

Defendants submit this proposed surreply regarding Plaintiffs' Motion for Class Certification limited to Plaintiffs' argument regarding Defendants' experts, architect, Myles Glick, and William Runyon [ECF 78, at 12-15]. Both Glick and Runyon were retained as experts to opine with regard to the *merits* of Plaintiffs' claims. While their opinions undermine the Plaintiffs' claims, neither expert was specifically retained as an expert on class certification issues.

Plaintiffs noticed the depositions of each expert for November 9, 2021, but declined to proceed on the basis that Defendants' expert disclosures did not satisfy Fed. R. Civ. P. 26(a)(2)(B) and Fed. R. Evid. 702. *See Transcript, **Exhibit A***). Defendants' counsel requested an explanation of precisely in what manner the disclosures were deficient, but Plaintiffs declined. Defendants once again attempted to confer on this issue via letter dated November 9, 2021, once again requesting an explanation of how Plaintiffs contend the disclosures were deficient. Plaintiffs' counsel did not respond. (*Correspondence to Dan Slotchiver, **Exhibit B***). Finally, on January 5, 2022, upon realizing that Glick's entire report had inadvertently not been previously exchanged,

Defendants' counsel forwarded the full report to Plaintiffs (*Correspondence to Slotchiver, **Exhibit C***).

Plaintiffs neglected to bring this matter to the attention of Defendants or file a timely motion with the Court. Further, they have had ample notice of Mr. Glick's report and cannot establish any prejudice resulting from the late disclosure of the full extent of Mr. Glick's opinions. As such Plaintiffs' contentions and argument on this issue have nothing to do with the issue of class certification and should be disregarded.

Respectfully submitted,

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ATTORNEYS FOR DIOCESE DEFENDANTS

February 1, 2022

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

Gary Nestler, Viewed Student
Female 200, Viewed Student Male 300,
on behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

The Bishop of Charleston, a Corporation
Sole, Bishop England High School,
Tortfeasors 1-10, The Bishop of the
Diocese of Charleston, in his official
capacity, and Robert Guglielmone,
individually,

Defendants.

Civil Action No. 2:21-613-RMG

ORDER AND OPINION

Before the Court is Plaintiffs' motion for class certification (Dkt. No. 67). For the reasons set forth below, the Court denies Plaintiffs' motion.

Facts

Plaintiffs bring this putative class action alleging that, from roughly 1989 through 2019, students at Bishop England High School ("BEHS") were made to disrobe in locker rooms which contained coaches' offices with "large glass window[s]" whereby BEHS employees, agents, and/or others may have viewed students.

Per the Amended Complaint, around May 1, 2019, Defendants learned that BEHS employee Jeffrey Alan Scofield had "surreptitiously filmed students while they used a BEHS locker room, through the window viewing the locker room, and had stored the recordings on an electronic device believed to be a computer belonging to BEHS." Defendants reported Scofield to law enforcement authorities. The City of Charleston Police Department arrested Scofield on

charges of voyeurism. Scofield subsequently pled guilty to the charges in the Berkely County Court of General Sessions. *See* (Dkt. No. 35). Plaintiffs initiated this action.

Plaintiffs propose two putative classes—a “Tuition Class” and a “Viewed Class.”

The *Tuition Class*[] consists of all those persons, or such persons’ personal representatives, heirs or assigns, wherever located, who have or in the future may have any claim against Defendants The Bishop of Charleston, a Corporation Sole, Bishop England High School, Tortfeasors 1-10, The Bishop of the Diocese of Charleston, in his official capacity, and Robert Guglielmone, individually, arising out of, based upon, or in any way related to, or involving claims for reimbursement of tuition paid to Defendants as a result of Jeffrey Scofield or any other Bishop England High School employee or agent monitoring, watching, viewing, spying, prying, besetting, photographing or videotaping them, or other such similar type conduct, through the viewing windows of the coaches’ office into the locker rooms while attending Bishop England High School from 1998 through 2019.

The *Viewed Class*[] consists of all those persons, or such persons’ personal representatives, heirs or assigns, wherever located, who have or in the future may have any claim against Defendants The Bishop of Charleston, a Corporation Sole, Bishop England High School, Tortfeasors 1-10, The Bishop of the Diocese of Charleston, in his official capacity, and Robert Guglielmone, individually, arising out of, based upon, or in any way related to, or involving injuries or damages claimed as a result of Jeffrey Scofield or any other Bishop England High School employee or agent monitoring, watching, viewing, spying, prying, besetting, photographing or videotaping them, or other such similar type conduct, through the viewing windows of the coaches’ or other BEHS officials’ offices into the locker rooms while attending Bishop England High School from 1998 at least through 2019.

(Dkt. No. 67 at 34-35).

As to the Tuition Class, Plaintiffs bring claims for: (1) Negligence, (2) Unjust Enrichment, (3) Breach of Warranty, and (4) Negligent Hiring, Supervision and Retention. As to the Viewed Class, Plaintiffs bring claims for: (1) Wrongful Intrusion into Private Affairs, (2) Negligence, and (3) Negligent Hiring, Supervision and Retention. (Dkt. No. 35 at 16-27).

On December 13, 2021, Plaintiffs moved for class certification. (Dkt. No. 67). Defendants oppose. (Dkt. No. 75). Plaintiffs filed a reply. (Dkt. No. 78).¹ Defendants filed a surreply. (Dkt. No. 83).

Plaintiffs' motion is fully briefed and ripe for disposition.

Legal Standard

Rule 23(a) of the Federal Rules of Civil Procedure identifies the prerequisites for a class action as follows:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a); *see generally Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 568 U.S. 455, 133 S.Ct. 1184, 1191, 185 L.Ed.2d 308 (2013); *Gray v. Hearst Commc'ns, Inc.*, 444 Fed. Appx. 698, 700 (4th Cir. 2011); *Brown v. Nucor Corp.*, 576 F.3d 149, 152 (4th Cir. 2009); *Thorn v. Jefferson–Pilot Life Ins. Co.*, 445 F.3d 311, 339 (4th Cir. 2006). These four prerequisites for class certification under Rule 23(a) are commonly referred to as numerosity, commonality, typicality, and adequacy of representation.

In addition to the requirements of Rule 23(a), Plaintiffs must also meet the requirements for maintenance of a class action imposed by Rule 23(b)(3)—namely, that “the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently

¹ In their reply, “Plaintiffs concede, and withdraw their Motion for Class Certification as to the cause of action for Negligent Hiring.” (Dkt. No. 78 at 15).

adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). Factors pertinent to a determination whether the “predominance” and “superiority” requirements have been satisfied include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Id.

“Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). Certification is only proper if the Court, after conducting a “rigorous analysis,” is satisfied that the prerequisites of Rule 23 have been satisfied. *See id.* at 350–51, 131 S.Ct. 2541. “Frequently that ‘rigorous analysis’ will entail some overlap with the merits of the plaintiff’s underlying claim. That cannot be helped.” *Id.* at 351, 131 S.Ct. 2541. However, “‘Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage,’” and “the merits of a claim may be considered only when ‘relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.’” *Brown v. Nucor Corp.*, 785 F.3d 895, 903 (4th Cir. 2015) (quoting *Amgen Inc.*, 568 U.S. at 466). “Plaintiffs bear the burden of demonstrating satisfaction of the Rule 23 requirements and the district court is required to make findings on whether the plaintiffs carried their burden.” *Thorn v. Jefferson–Pilot Life Ins. Co.*, 445 F.3d 311, 317 (4th Cir. 2006) (quoting *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 370 (4th Cir. 2004)) (internal quotation marks and modifications omitted).

In addition to the two-step framework expressly laid out in Rule 23, the Fourth Circuit has “repeatedly recognized that Rule 23 contains an implicit threshold requirement that the members of a proposed class be ‘readily identifiable.’” *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014) (quoting *Hammond v. Powell*, 462 F.2d 1053, 1055 (4th Cir. 1972)). Other circuits have described this rule as an “ascertainability” requirement. *Id.* “However phrased, the requirement is the same. A class cannot be certified unless a court can readily identify the class members in reference to objective criteria.” *Id.*

In *EQT Production Co.*, the Fourth Circuit vacated the class certification decision of the district court and remanded the case for reconsideration of the ascertainability issues, concluding that the district court had previously “failed to rigorously analyze whether the administrative burden of identifying class members ... would render class proceedings too onerous.” 764 F.3d at 358. The Fourth Circuit explained “[a] class cannot be certified unless a court can readily identify the class members in reference to objective criteria.” *Id.* (citing *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012); *Crosby v. Soc. Sec. Admin. of U.S.*, 796 F.2d 576, 579–80 (1st Cir. 1986)). Specifically, although “plaintiffs need not be able to identify every class member at the time of certification[,] ... ‘[i]f class members are impossible to identify without extensive and individualized fact-finding or ‘mini-trials,’ then a class action is inappropriate.” *Id.* (quoting *Marcus*, 687 F.3d at 593). *EQT Production Co.* has come to stand for the proposition that the goal of the “readily identifiable” requirement is “to define a class in such a way as to ensure that there will be some ‘administratively feasible [way] for the court to determine whether a particular individual is a member’ at some point.” *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 658 (4th Cir. 2019) (quoting *EQT Prod. Co.*, 764 F.3d at 358). Moreover, courts have further expounded that a “plaintiff cannot merely identify a mass of data which could aid the process of identifying

class members[.] ... the Plaintiff must also provide an efficient method of using this information.” *Spotswood v. Hertz Corp.*, No. RDB-16-1200, 2019 WL 498822, at *6 (D. Md. Feb. 7, 2019).

Rule 23’s Requirements as Considered in this Action

1. Ascertainability

a. Fail-Safe Classes

A fail-safe class is one that “is defined so that whether a person qualifies as a member [of the class] depends on whether the person has a valid claim.” *Bigelow v. Syneos Health, LLC*, No. 5:20-CV-28-D, 2020 WL 5078770, at *4 (E.D.N.C. Aug. 27, 2020) (citing *EQT Production Co.*, 764 F.3d at 360 n.9); *Messner v. Northshore Univ. HealthSys.*, 669 F.3d 802, 825 (7th Cir. 2012). Fail-safe classes are considered improper for two reasons. First, in a fail-safe class, “a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment.” *Messner*, 669 F.3d at 825. Hence, fail-safe classes “fail to provide the resolution of the claims of all class members that is envisioned in class action litigation.” *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012). Second, fail-safe classes do not comply with Rule 23. Specifically, Rule 23 requires—as noted above—that members of a proposed class be ascertainable. *Krakauer*, 925 F.3d at 655. In certifying a class, however, a court may not “conduct a preliminary inquiry into the merits of a suit.” *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177 (1974). But “class litigation should not move forward when a court cannot identify class members without ‘extensive and individualized fact-finding or mini-trials.’” *Krakauer*, 925 F.3d at 658. (quoting *EQT Prod. Co.*, 764 F.3d at 358). Because a fail-safe class requires a court to inquire into the merits of the underlying case to identify the members of the class, fail-safe class definitions violate these principles. *See, e.g., Chado v. Nat’l Auto Inspections, LLC*, No. JKB-17-2945, 2019 WL 1981042, at *4, (D. Md. May 3, 2019).

b. South Carolina Tort for Wrongful Intrusion into Private Affairs

The cause of action for wrongful intrusion into private affairs consists of (1) an intentional (2) intrusion, (3) which is substantial and unreasonable, (4) into that which is private. *Snakenberg v. Hartford Cas.*, 299 S.C. 164, 171-72 (Ct. App. 1989). Damages “consist[] of the unwanted exposure resulting from intrusion.” *Id.* at 172. Where “a plaintiff bases an action for invasion of privacy on ‘intrusion,’ bringing forth no evidence of public disclosure, it is incumbent upon him to show a blatant and shocking disregard of his rights, and serious mental or physical injury or humiliation to himself resulting therefrom.” *O’Shea v. Lesser*, 308 S.C. 10, 17-18 (1992) (citing *Rycroft v. Gaddy*, 281 S.C. 119 (Ct. App. 1984)).

c. Plaintiffs’ Proposed Classes Are Not Ascertainable

Defendants argue that Plaintiffs’ proposed classes are not ascertainable. Defendants argue that Plaintiffs’ proposed classes are impermissible “fail-safe” classes or otherwise “too vague, too broad, or too subjective” to satisfy the ascertainability requirement. (Dkt. No. 75 at 13-14). Namely, Defendants argue that Plaintiffs’ proposed classes cannot be defined with objective criteria as only those individuals who were viewed or who paid tuition for children who were viewed would be part of the classes. *See (id.* at 13).

Plaintiffs argue the proposed classes are ascertainable because they are “objectively defined as all students that attended Bishop England [from 1998 through 2019].” (Dkt. No. 78 at 6-7). To support this conclusion, Plaintiffs argue that the tort of wrongful intrusion into private affairs does not require proof of actual viewing. (Dkt. No. 67 at 25 & n.4) (string citing various cases from outside of South Carolina to this effect)²; *e.g.*, *Friedman v. Martinez*, 242 N.J. 449

² As to the Viewed Class, Plaintiffs do not discuss their negligence claim in either their opening memorandum or reply. *See* (Dkt. No. 67 at 2) (noting only that Plaintiffs bring negligence claims); (Dkt. No. 78). Presumably, because a class member would not be able to establish a negligence

(2020) (holding that, under New Jersey law, and pursuant to Restatement (Second) of Torts § 652B, “a victim does not have to present evidence that she was secretly recorded to bring a cause of action for intrusion onto seclusion” as “[t]he harm occurs when the electronic invasion of privacy takes place”); *Koeppel v. Speirs*, 808 N.W.2d 177, 182 (Iowa 2011) (noting that courts “across the nation are divided on the question whether a person can intrude without actually viewing or recording the victim”); *Id.* (finding that under Iowa law the tort does not require proof of actual viewing, adopting the reasoning set forth in *Hamberger v. Eastman*, 106 N.H. 107 (1964) and further reasoning that “Restatement (Second) of Torts [§ 652B illus. 3, at 379] make[s] no suggestion that the intrusion into solitude or seclusion requires someone to actually see or hear the private information”). “Applying this law to the facts of the case,” Plaintiffs argue, “it is indisputable that . . . all students that attended [BEHS] from 1998 through 2019,” are necessarily class members, thus rendering the proposed classes objectively definable. (Dkt. No. 78 at 7).

The Court finds that Plaintiffs’ proposed classes are not ascertainable. Plaintiffs misstate the law in South Carolina as to the tort of intrusion into private affairs. Plaintiffs ignore that South Carolina is not a Restatement district for this tort, *Snakenberg*, 299 S.C. at 170-71; Eli A. Meltz,

claim without proof that she was in fact harmed—i.e., viewed—the analysis described herein applies equally to the Viewed Class’s negligence claim. Further, the same analysis would apply to the claims of the Tuition Class, all of which turn on a child being “viewed.” *See, e.g.*, (Dkt. No. 35 ¶ 115) (Defendants negligent because they “directed, allowed, and/or encouraged adult athletic officials or others, including all their agents, employees, and/or servants, to observe, watch, monitor, spy, or otherwise view the VIEWED CLASS members in the subject locker rooms (male and female)”); (*Id.* ¶ 81) (Defendants negligent toward Tuition Class “by designing, constructing, and maintaining the BEHS locker rooms and athletic offices in a way that adult athletic officials or their other agents, employees, and/or servants and others would have unfettered, open, and intrusive view of the student s while they engaged in private activities such as dressing, undressing, being nude, disrobing, showering and drying, and an opportunity for actors and perpetrators to derive sexual pleasure from such observation and recorded material”); (*Id.* ¶¶ 86-87) (Defendants liable for unjust enrichment as to Tuition Class because “Defendants failed to take adequate steps to prevent students from being viewed”); (*Id.* ¶¶ 94-95, 97) (same regarding warranty claim of Tuition Class—“Defendants granted access to BEHS to Scofiled including . . . viewing rooms”).

No Harm, No Foul? "Attempted" Invasion of Privacy and the Tort of Intrusion Upon Seclusion, 83 Fordham L. Rev. 3431, 3450 (2015), and that, to the contrary, South Carolina law explicitly requires that information about the victim be acquired by the defendant for the tort to be actionable. *Compare Snakenberg*, 299 at 171 (“[T]he damage consists of the unwanted *exposure resulting* from the intrusion.”) (emphasis added); *Id.* (noting that “[a]n intrusion may consist of *watching, spying, prying, besetting, overhearing*, or other similar conduct”—implicitly requiring a defendant actually view the plaintiff) (emphasis added); *Meltz*, 83 Fordham L. Rev. at 3450 (“South Carolina’s formulation of the cause of action indicates that, unlike section 652B, information must be acquired about the plaintiff to be actionable: the damage is from the unwanted exposure arising from the intrusion and *not from the intrusive act itself*, as the Restatement indicates.”) (emphasis added); *O’Shea*, 308 S.C. at 17-18 (implicitly acknowledging information must be obtained about the plaintiff because, where “a plaintiff bases an action for invasion of privacy on ‘intrusion,’ *bringing forth no evidence of public disclosure* [of the information], it is incumbent upon him to show a blatant and shocking disregard of his rights, and serious mental or physical injury or humiliation to himself resulting therefrom”) (emphasis added) *with Koeppel*, 808 N.W.2d at 182, 184 (holding that under Iowa law an intrusion can occur without actually viewing or recording the victim). Given the above, Plaintiffs’ proposed classes will not be defined “until the case is resolved on the merits,” *Bigelow*, 2020 WL 5078770, at * 5, because only if a putative class member can show that he, she, or her child was viewed in the locker rooms will that individual be known to be part of one of the putative classes, *Melton ex rel. Dutton v. Carolina Power & Light Co.*, 283 F.R.D. 280, 288 (D.S.C. 2012) (noting that fail-safe classes “require[] a court to rule on the merits of the claim at the class certification stage in order to tell who was included in the class” and that “[s]uch a class definition is improper because a class member either wins or, by virtue of losing,

is defined out of the class and is therefore not bound by the judgment.”) (citing *Messner*, 669 F.3d at 826).³ Accordingly, the proposed classes are unascertainable and cannot be certified. *See Krakauer*, 925 F.3d at 658.

2. Standing

Assuming for argument’s sake that Plaintiffs’ proposed classes were ascertainable, the Court considers whether Plaintiffs’ named representatives have constitutional standing.

The Supreme Court has made clear that “named plaintiffs who represent a class ‘must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.’” *Doe v. Obama*, 631 F.3d 157, 160 (4th Cir. 2011) (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n. 20, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976)). Without a sufficient allegation of harm to the named plaintiff in particular, plaintiffs cannot meet their burden of establishing standing. *Id.*;

³ In *Bigelow*, the proposed class was “Any and all employees who worked for Defendant during the relevant limitations period who were denied promotions, pay increases, and/or suffered any adverse employment action, as a result of her/his/their prior or anticipated use of protected FMLA leave during her/his/their employment.” The Court found:

This class definition turns on whether the employee has a valid claim, and “[t]hat is a classic fail-safe class.” To illustrate, if plaintiff fails to prove (1) that a particular employee experienced adverse promotion, pay, or employment actions or (2) that Syneos took such actions because the employee used or planned to use FMLA leave, then Syneos is entitled to a judgment in its favor with respect to that employee. The court, however, could not enter a judgment against that particular employee because that employee would no longer fit the class definition. *Bigelow*’s fail-safe class defines itself based on legal conclusions and impermissibly constitutes “a class that cannot be defined until the case is resolved on its merits.” A fail-safe class action leaves a defendant in a “heads, I win ... tails, I can sue again” situation, contravening the truism that class actions should “resolve an issue that is central to the validity of each one of the claims in one stroke.”

Bigelow v. Syneos Health, LLC, No. 5:20-CV-28-D, 2020 WL 5078770, at *5 (E.D.N.C. Aug. 27, 2020) (internal citations omitted).

see also *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210 (2021) (no standing for 6,332 class members whose credit reporting files contained inaccurate information but were not disseminated to third parties—“[t]he mere presence of an inaccuracy in an internal credit file, if it is not disclosed to third parties, causes no concrete harm”); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (noting that, “[t]o have standing, a plaintiff must show ‘injury in fact,’ causation, and redressability”); *Id.* (“Injury in fact” is an invasion of a legally protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’”).

Defendants argue that neither Viewed Student Female 200, Viewed Male Student 300, nor Nestler are adequate class representative because all lack standing to prosecute this lawsuit. (Dkt. No. 75 at 2, 15) (“Because there is not a shred of evidence that either student-plaintiff was actually illicitly recorded changing clothes—neither is among the five boys identified by the South Carolina Attorney General’s Internet Crimes Against Children Task Force as having been surreptitiously recorded changing clothes in the locker room by Jeffrey Scofield in 2019—Plaintiff’s claims are entirely ‘what might have happened’ or ‘what could have happened’ as opposed to what did happen.”). Plaintiffs, by contrast, argue that all elements of the tort of intrusion into private affairs are satisfied and further argue that Defendants have “admitted to the blanket monitoring of their students in the locker room. The school also conceded . . . in Principal Finneran’s testimony, that the monitoring of the students when they were unaware would constitute an invasion of privacy and is thus . . . not a safe, moral or nurturing environment.” (Dkt. No. 78 at 2); (Dkt. No. 67 at 4-5, 6) (stating that Defendants have “admitted to installing the viewing windows for monitoring the students for ‘safety reasons’ without the use of video cameras”) (citing the testimony of Roger Attansio, one of the architects of BEHS who testified, in response to Plaintiff’s question that

windows in the locker rooms act as “peepholes” “I don’t know that I would say it’s like a peephole. I guess one could make that argument, yes sir”); (*Id.* at 9) (arguing Defendants have “admitted to actually using” the windows because Maria Aselage, a spokesperson for the Diocese, released a press statement indicating the windows “were included in the plans and installed in the building in the 1990’s for safety reasons”).

Here, both Viewed Student Female 200 and Viewed Male Student 300 testified that, to their knowledge, they were not viewed by anyone through the windows in the locker rooms of BEHS. *See, e.g.*, Viewed Male Student 300 Deposition, (Dkt. No. 75-5 at 10:13-15) (“Q: Did anybody ever take a picture in the locker room? A: No.”); (*Id.* at 10:25-11:2) (“Q: Did you ever see the blinds open? A: No.”); (*Id.* at 11:22-24) (“Q: So you didn’t see [people in the coaches’ office when] looking into the office from the locker room? A: No.”); (*Id.* at 15:10-14) (testifying that “no one has informed” deponent that he was “photographed by any person, not just Scofield” while changing clothes in the locker room); (Dkt. No. 67-18 at 32:3-6) (“Q: So you’re suing because of something that might have happened, but you don’t know whether it did or not? A: [Yes,] I think that’s worse than knowing.”); Viewed Student Female 200 Deposition, (Dkt. No. 75-6 at 9:5-19) (testifying deponent saw blinds on the windows, that the blinds were “closed” and that she could not remember if she “ever s[aw] the blinds open”); (*Id.* at 12:4-9) (“Q: And you never observed anybody looking through the window while you were changing clothes, correct? A: No. Q: You did not see anybody? A: No.”); (*Id.* at 16:10-12) (“Q: Has anyone alerted you that somebody had taken pictures of you? A: As of this moment, no.”). Defendants further point out that Plaintiff’s expert psychologist testified as follows regarding the harm allegedly suffered by the named viewed plaintiffs:

It’s kind of an idea of if I’m driving across a bridge and the bridge collapses, but I made it across the bridge, but the car behind me almost didn’t, and the car behind

it didn't, I might go on and be okay until I learned, wow, do you realize just how close that was on that day to ending my life. And it's a moment when you take a pause.

Amanda Salas, MD Deposition, (Dkt. No. 75-2 at 82:11-18). As to Gary Nestler, the named plaintiff for the Tuition Class, Nestler testified that his daughter was bullied at BEHS, (Dkt. No. 75-8 at 53:14-17), that Nestler was harmed because he felt his daughter did not receive a "safe" education due to the windows in the locker rooms at BEHS, (*Id.* at 53:7-13), but that Nestler did not know if his daughter had ever been photographed or videoed, (*Id.* at 55:3-23).

In their motion for class certification, Plaintiffs cite *Snakenberg v. Hartford Cas Ins. Co.*, 299 S.C. 164 (Ct. App. 1989) and assert it stands for the proposition that "[a]ll Plaintiffs need to prove in this case is the four elements of the invasion of privacy tort, and then, 'the fact of damage is established as a matter of law.'" (Dkt. No. 67 at 24). Plaintiffs continue that, because "their privacy was invaded by the use of the viewing portals," and because "it is not necessary for the Class Representatives to 'prove' that they were actually viewed or monitored," the class representatives are adequate and class certification appropriate. (*Id.* at 24-25 & n.4) (string citing cases such as *Koeppel* and *Friedman* which do not require that a victim show she was viewed to state a claim).

The Court finds that Plaintiffs' class representatives lack Article III standing and are inadequate class representatives. As noted above, *Snakenberg* does require that an individual show she was viewed to bring an intrusion of privacy claim. And, as also detailed *supra*, neither Viewed Student Female 200 nor Viewed Male Student 300 testified to having been viewed by anyone and are thus not even members of Plaintiffs' proposed classes. Nor did Nestler testify that his daughter had been viewed. As such, none of these individuals suffered an "intrusion" under *Snakenberg*,

299 S.C. at 171, or an otherwise concrete harm which would confer Article III standing. *See TransUnion*, 141 S. Ct. at 2200 (“No concrete harm, no standing.”).

Because the Court finds there are fatal flaws in Plaintiffs’ class definitions and that Plaintiffs’ named representatives lack standing, Plaintiffs’ motion for class certification should be denied. Nevertheless, because deficient class definitions can be modified—though Plaintiffs do not seek leave to amend should the Court deny their motion—the Court will continue with its class certification analysis, focusing on predominance and superiority.

3. Rule 23(b)(3)

a. Plaintiffs Fail to Demonstrate Predominance

Rule 23(b)(3) was added as part of the 1966 rule amendments. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). It was “designed to secure judgments binding all class members save those who affirmatively elected to be excluded” in situations where certification is “convenient and desirable.” *Id.* at 614–15 (citing advisory committee’s note to 1946 amendment). The rule provides that if the requirements of Rule 23(a) are satisfied, the action may be maintained as a class action when “the questions of law or fact common to class members predominate over any questions affecting only individual members, and ... a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). Thus, the two requirements—predominance and superiority.

The two requirements serve two purposes. “The predominance requirement ‘tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.’” *Thorn*, 445 F.3d at 319 (citing *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 362 (4th Cir. 2004)); *see also Amchem*, 521 U.S. at 615 (noting the Advisory Committee sought to cover cases that would achieve “uniformity of decisions as to persons similarly situated, without sacrificing procedural

fairness or bringing about other undesirable results”). “The superiority requirement ensures that ‘a class action is superior to other available methods for the fair and efficient adjudication of the controversy.’” *Thorn*, 445 F.3d at 319 (citing Fed. R. Civ. P. 23(b)(3)). And Rule 23 itself sets forth several factors the court should consider in deciding whether the putative class action meets the two requirements: (1) “the class members’ interests in individually controlling the prosecution or defense of separate actions;” (2) “the extent and nature of any litigation concerning the controversy already begun by or against class members;” (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;” and (4) “the likely difficulties in managing a class action.” Fed. R. Civ. P. 23(b)(3)(A)–(D).

The “predominance requirement is ‘far more demanding’ than Rule 23(a)’s commonality requirement.” *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 459 (4th Cir. 2013) (Niemeyer, Jr. concurring in part and dissenting in part) (citing *Amchem*, 521 U.S. at 623). The United States Supreme Court has stated that “[c]onsidering whether ‘questions of law or fact common to class members predominate’ begins, of course, with the elements of the underlying cause of action.” *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011). The Fourth Circuit has similarly noted that “[t]he application of Rule 23 often turns on the cause of action.” *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 655 (4th Cir. 2019).

If “[a] cause of action [] includes a fact-bound element or a claim-specific affirmative defense [, it] may be less susceptible to class treatment than one that does not.” *Id.* The focus of the predominance analysis being “common proof,” with the “availability of such proof turn[ing] on what exactly needs to be proven.” *Id.*; see also *Case v. French Quarter III, LLC*, No. 2:12-cv-2518, 2015 WL 12851717, at *6 (D.S.C. July 27, 2015) (“In mass tort cases, common issues of law and fact have been held to predominate ‘where the same evidence would *resolve* the question

of liability for all class members.”) (emphasis added); *Farrar & Farrar Dairy, Inc. v. Miller-St. Nazianz, Inc.*, 254 F.R.D. 68, 72 (E.D.N.C. 2008) (“[A] court must ensure that class certification in a mass tort case really does foster [justice and judicial efficiency].”). Where a plaintiff “must still introduce a great deal of individualized proof or argue a number of individualized legal points to establish most or all of the elements of their individual claims, the common issues do not predominate.” *Case*, 2015 WL 12851717, at *6 (internal quotation omitted).

Relying on their erroneous interpretation of *Snakenberg*, Plaintiffs argue that predominance is met here because “the issue of unwanted . . . exposure is common to all students that attended [BEHS] from 1998 to 2019. All students used the locker rooms, and all had their privacy invaded,” leaving the “only question to be resolved . . . the amount of damages to be assessed by the trier of fact.” (Dkt. No. 67 at 32).

The Court concludes that questions of individual proof and damages will predominate over common issues of the litigation. *See Case*, 2015 WL 12851717, at *6. As noted above, to state plausible causes of action, especially as to invasion of privacy, factual questions would need to be resolved for each individual class member. These include whether a class member or a class member’s child was in-fact viewed and the unique “shame, humiliation, and emotional distress suffered by the [class member]” in order to calculate damages. *Snakenberg*, 299 S.C. at 171-72; *see* (Dkt. No. 75 at 24) (“The privacy claims alone would require massive individualized evidence regarding whether any child over the last 20 years actually had his or her privacy invaded unjustifiably. Whether any student suffered any injury at any time will completely depend on individualized evidence. Likewise, as Dr. Salas admitted, the extent of any impact on any former student will be entirely individualized.”); *see also* (*id.* at 23) (noting, as to the proposed parent class, that Nestler claims he was promised his daughter would be “educated in a safe, nurturing

environment” but that Plaintiffs have “presented no evidence that the parents of every aspirant to attend Bishop England received or relied on any such statements, or that either the warranty claim . . . or unjust enrichment claim can be determined for the entire class with common proof”); (Dkt. No. 67 at 26) (citing to screenshots of BEHS’s website for the proposition that BEHS held itself out to the Tuition Class “as a moral, caring and safe environment to send one’s child or children” and that it would “seriously curb the possibility of sexual abuse happening in our parishes”); (Dkt. No. 78 at 8) (arguing that is not necessary to “make individual inquires for a class-wide determination that the representation was relied on”, citing to *Moyle v. Liberty Mut. Ret. Ben. Plan*, 823 F.3d 948, 964 (9th Cir. 2016), *as amended on denial of reh’g and reh’g en banc* (Aug. 18, 2016) for the proposition “[w]here the defendant’s representations were allegedly made on a uniform and classwide basis, individual issue of reliance do not preclude class certification,” but citing no testimony or evidence *here* as to classwide or uniform representations); (Dkt. No. 67-21 at 48:10-16) (testifying three employees of BEHS told Nestler the school was “safe”). Stated simply, Plaintiffs cannot establish predominance as individual issues will predominate over common issues of the litigation. *See Kline v. Security Guards, Inc.*, 196 F.R.D. 261, 268, 272 (E.D. Pa. 2000) (denying plaintiffs’ motion for class certification for lack of, inter alia, ascertainability and predominance because the pertinent tort—violation of the Wiretap Act—required individualized determinations as to each class members reasonable expectation of privacy and “[t]hese factors are likely to be markedly different for members of the putative class. For instance, a class member who had a conversation while other people were nearby, such as during the start of the work shift, would not have nearly the objective expectation of privacy as would a member who was alone in the entranceway and quietly conducting union business on the telephone. The multitude of individual inquiries simply to determine class membership is inapposite to the

expected efficiencies of a class action”); (*Id.*) (“Plaintiffs in this case maintain that Defendants engaged in a common course of conduct [the installation of cameras and a microphone near an employee entrance and payphone] to violate the Wiretap Act. They assert that the alleged constant audio surveillance is a common question to all, as are questions relating to their claims of conspiracy and negligent supervision. However, the complaint is based upon allegations of individual violations, each of which turns on individual circumstances. Without an objectively reasonable expectation of privacy, conversations made by a particular class member will not be protected oral communications under the Act.”).

b. Plaintiffs Fail to Demonstrate Superiority

Superiority requires that use of a class action be “superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). Superiority ““depends greatly on the circumstances surrounding each case,”” and “[t]he rule requires the court to find that the objectives of the class-action procedure really will be achieved in the particular case.”” *Stillmock v. Weis Markets, Inc.*, 385 Fed. Appx. 267, 274 (4th Cir. 2010). When making this determination, the Court should “not contemplate the possibility that no action at all might be superior to a class action.” *Thomas v. FTS USA, LLC*, 312 F.R.D. 407, 425 (E.D. Va. 2016) (quoting *Brown v. Cameron–Brown Co.*, 92 F.R.D. 32, 49 (E.D. Va. 1981)). Factors the court should consider include: “(A) the class members’ interest in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing the class action.” Fed. R. Civ. P. 23 (b) (3) (A)-(D). Ultimately, “[t]he goal is to

ensure that class certification occurs only when economy and efficiency are reasonably likely to result.” *Ganesh, L.L.C. v. Comput. Learning Ctrs., Inc.*, 183 F.R.D. 487, 491 (E.D. Va. 1998).

Here, Plaintiffs do not address superiority. *See* (Dkt. No. 67 at 33-34) (discussing predominance and arguing that “Plaintiffs must satisfy [only] one of the Rule 23(b) factors”). *Contra, e.g., Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 424 (4th Cir. 2003) (“To be sure, Rule 23(b)(3) class actions must meet predominance and superiority requirements not imposed on other kinds of class actions.”); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006) (“Rule 23(b)(3) has two components: predominance and superiority.”).

The Court finds that the superiority requirement is not met. As Defendants correctly argue, to the extent individuals believe they were filmed or photographed, such individuals may bring individual lawsuit to vindicate those rights. *See Castano v. Am. Tobacco Co.*, 84 F.3d 734, 748 (5th Cir. 1996) (no superiority where individual damage claims are high). Further, as discussed above, because Plaintiffs’ claims turn on individual questions as to each class member, the difficulties in managing this case as a class action would be great. *See* (Dkt. No. 75 at 26) (noting the Court would have to “conduct numerous trials within a trial: were you a student? is your claim time-barred? were you viewed illicitly and without reason? did you suffer mental harm as a result?”); *O’Shea v. Lesser*, 308 S.C. 10, 17-18 (1992) (Where “a plaintiff bases an action for invasion of privacy on ‘intrusion,’ bringing forth no evidence of public disclosure, it is incumbent upon him to show a blatant and shocking disregard of his rights, and serious mental or physical injury or humiliation to himself resulting therefrom.”); § 4:64. Overview, 2 Newberg on Class Actions § 4:64 (5th ed.) (superiority often met in two situations, either where “many individuals have small damage claims” and where, absent a class suit, “it is unlikely that any of the claims will be accorded relief” or where the legal system is “flooded by particular types of claims”); *Amchem*

Products, Inc., 521 U.S. at 617 (“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.”) (citation omitted); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 860, 119 S. Ct. 2295, 144 L. Ed. 2d 715, 43 Fed. R. Serv. 3d 691 (1999) (“One great advantage of class action treatment of mass tort cases is the opportunity to save the enormous transaction costs of piecemeal litigation.”).

Conclusion

For the reasons stated above, the Court **DENIES** Plaintiffs’ motion for class certification (Dkt. No. 67).

AND IT SO ORDERED.

s/ Richard Mark Gergel
Richard Mark Gergel
United States District Judge

March 24, 2022
Charleston, South Carolina

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

CIVIL ACTION NUMBER: 2:21-cv-613-RMG

Gary Nestler, *et al*,

Plaintiffs,

v.

The Bishop of Charleston, a Corporation
Sole, *et al*,

Defendants.

**DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT**

Based upon the Court's Order denying class certification [Dkt. 84], and the determination that Plaintiffs do not have constitutional standing to assert the claims alleged in the Amended Complaint [ECF 35][Order, pp. 12-14], Defendants move for summary judgment as to all claims. As the Court determined, none of the Plaintiffs have established "a concrete harm that would confer Article III standing." [*Id. citing TransUnion, LLC v. Ramirez*, 141 S.Ct. 2190, 2200 (2021)].

In accordance with Local Civil Rule 7.04, DSC, a full explanation of the motion is contained with this motion and the referenced Order of the Court such that a memorandum or affidavit would serve no useful purpose.

Respectfully submitted,

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ATTORNEYS FOR DIOCESE DEFENDANTS

April 8, 2022

**United States District Court
District of South Carolina
Charleston Division**

Gary Nestler,
Viewed Student Female 200,
Viewed Student Male 300,
on behalf of themselves and all others
similarly situated,

Plaintiffs,

vs.

The Bishop of Charleston, a Corporation
Sole, Bishop England High School,
Tortfeasors 1-10, The Bishop of the Diocese
of Charleston, in his official capacity, and
Robert Guglielmone, individually,

Defendants.

C/A: 2-21-cv-00613-RMG

**PLAINTIFFS' MOTION FOR
RECONSIDERATION PURSUANT TO
FED. R. CIV. P. 59(e)**

Come now Plaintiffs by and through their undersigned attorneys, and file this their Motion for Reconsideration of the Court's March 24, 2022 denial of the Plaintiffs' Motion for Class Certification. Plaintiffs file this motion with the utmost respect for this Court, however, humbly and confidently submit that the Court's denial of its motion for class certification was a manifest error of law for the reasons set forth herein.

I. Standard Applicable to Motion.

The purpose of a motion to alter or amend a judgment under Fed.R.Civ.P. 59(e) is to "correct manifest errors of law or fact or to present newly discovered evidence." *Ruscavage v. Zuratt*, 831 F. Supp. 417, 418 (E.D. Pa. 1993). Granting such a motion means that a court must

find that it overlooked “matters or controlling decisions” which, if it had considered such issues, “would have mandated a different result.” *Eisert v. Town of Hempstead*, 918 F. Supp. 601, 606 (E.D.N.Y. 1996). Here, the basis of the Court’s denial of its motion for class certification was based upon an erroneous reading of South Carolina law articulating the tort of invasion of privacy – intrusion into private affairs. The Court overlooked the South Carolina Supreme Court’s decision in *O’Shea v. Lesser*, 308 S.C. 10, 17–18, 416 S.E.2d 629, 633 (1992), where the court affirmed that under South Carolina law that “actual viewing” is not necessary to satisfy the “intrusion” element of the intrusion into private affairs tort. Had the Court relied upon that binding South Carolina precedent that does not require “actual viewing,” all of the requirements for class certification would have been met as the Court’s denial of three of the four class certification requirements that the Court held weren’t satisfied was predicated on an “actual viewing” standard.

II. Had the Court Determined “Actual Viewing” is Not Required under the Intrusion Tort, the Plaintiffs would have met the Ascertainability Requirement.

The lynchpin of three of the bases upon which the Court denied the motion for class certification is a single legal question – whether under South Carolina law, the tort of wrongful intrusion into private affairs requires proof of actual viewing. This legal question is central to the Court’s ascertainability (ECF 84 at 7), constitutional standing (*Id.* at 13), and predominance (*Id.* at 16) analyses, all of which rest upon the Court’s conclusion that proof of actual viewing is required in order to establish the intrusion tort.

South Carolina case law is scant when it comes to this question. The broad invasion of privacy tort was first recognized in South Carolina in *Holloman v. Life Ins. Co. of Virginia*, 192 S.C. 454, 7 S.E.2d 169 (1940). In *Holloman*, the South Carolina Supreme Court stated:

The right of privacy is one which was not definitely recognized by the law until comparatively recent times. But we find ourselves in agreement with a number of

authorities to the effect that the violation of such a right is under certain circumstances a tort which would entitle the injured person to recover damages. But the right of privacy is correctly defined in 21 R.C.L. 1196 as “the right to be let alone; the right of a person to be free from unwarranted publicity”. Or more specifically but less accurately, “the right to live without one's name, picture or statue, or that of a relative, made public against his will”.

Holloman, 7 S.E.2d at 171. Notably, this plain language from *Holloman* strongly suggests that the initial recognition in South Carolina of the broader tort of invasion of privacy only included one of the “sub-torts” – the “public disclosure of private affairs” tort.

Further recognition and expansion of the invasion of privacy tort by the Supreme Court of South Carolina came in *Meetze v. Associated Press*, 230 S.C. 330, 335, 95 S.E.2d 606, 608 (1956), where the court stated:

The ‘right of privacy’ has been defined as the right of an individual to be let alone, to live a life of seclusion, to be free from unwarranted publicity. 77 C.J.S., Right of Privacy, § 1; 41 Am.Jur., Privacy, Section 2. The following has been suggested as a fairly comprehensive definition of what constitutes an actionable invasion of the right of privacy: ‘The unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities, in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities.’ 41 Am.Jur., Privacy, Section 2; *Continental Optical Co. v. Reed*, 119 Ind.App. 643, 86 N.E.2d 306, 14 A.L.R.2d 743; *Smith v. Doss*, 251 Ala. 250, 37 So.2d 118. The existence of a legal right of privacy is recognized by the American Law Institute in the following language: ‘A person who unreasonably and seriously interferes with another's interests in not having his affairs known to others or his likeness exhibited to the public is liable to the other.’ 4 Restatement, Torts, Section 867.

Meetze is thus the first South Carolina case that recognized three separate sub-torts under the broader invasion of privacy tort – unwanted appropriation, public disclosure, and intrusion. Notably, in adopting this formulation of the invasion of privacy tort, the South Carolina Supreme Court relied upon the original Restatement of Torts, demonstrating that South Carolina generally looks with favor upon the Restatement formulations of the law.

The South Carolina Court of Appeals provided additional refinement. Relying upon *Meetze*, two 1984 Court of Appeals' decisions in *Rycroft v. Gaddy*, 281 S.C. 119, 124–25, 314 S.E.2d 39, 43 (Ct. App. 1984) and *Corder v. Champion Rd. Mach. Int'l Corp.*, 283 S.C. 520, 525, 324 S.E.2d 79, 82 (Ct. App. 1984) articulated the invasion of privacy tort this way:

In order to state a cause of action for this tort the plaintiff must allege: (1) the unwarranted appropriation or exploitation of his personality; or (2) the publicizing of his private affairs with which the public has no legitimate concern; or (3) the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.

Rycroft and *Corder* made plain that there are three separate “sub-torts” (or “complex of several torts,” as this Court wrote in *Shorter v. Retail Credit Co.*, 251 F. Supp. 329, 330 (D.S.C. 1966)) under the broader tort of invasion of privacy, just as the South Carolina Supreme Court in *Meetze* recognized. This formulation of the invasion of privacy tort was also used in *Wright v. Sparrow*, 298 S.C. 469, 471, 381 S.E.2d 503, 505 (Ct. App. 1989).

The Court of Appeals in *Rycroft* went on to set forth the required elements of the intrusion into private affairs claim. The *Rycroft* court held that:

When a plaintiff bases an action for invasion of privacy on “intrusion” alone, bringing forth no evidence of public disclosure, it is incumbent upon him to show a blatant and shocking disregard of his rights, and serious mental or physical injury or humiliation to himself resulting therefrom. *Shorter v. Retail Credit Co.*, 251 F. Supp. 329 (D.S.C.1966).

Rycroft, 281 S.C. at 124–25, 314 S.E.2d at 43. The *Rycroft* court’s statement “bringing forth no evidence of public disclosure” is a recognition that “public disclosure” is not a necessary element of the intrusion tort, if a plaintiff can show “a blatant and shocking disregard of his rights, and serious mental or physical injury or humiliation to himself resulting therefrom.” This tracks in complete harmony with the Second Restatement of Torts § 652(B), which does not require acquisition of information for the intrusion tort. *See* Restatement (Second) of Torts § 652B cmt. a

(1977) (explaining that the form of invasion of privacy covered by intrusion upon seclusion —consists solely of an intentional interference with the plaintiff’s seclusion and does not depend on publicity given to the plaintiff’s private affairs).

The 1989 Court of Appeals decision in *Snakenberg v. Hartford Cas. Ins. Co.*, 299 S.C. 164, 171, 383 S.E.2d 2, 6 (Ct. App. 1989) is the next case where South Carolina courts examined the intrusion into private affairs claim. *Snakenberg* is an “actual viewing” case, where the plaintiff concealed a video tape camera and recorder in a dressing room and was filming and recording teenage girls changing from swimsuit to swimsuit. *Snakenberg*, 299 S.C. at 167, 383 S.E.2d at 4. As an “actual viewing” case, there was no reason for the *Snakenberg* court to consider the question of whether or not “actual viewing” is a required element of the intrusion tort. Nevertheless, the *Snakenberg* court undertook the task of examining the “nature and scope” of the intrusion tort. *Id.*, 299 S.C. at 171, 383 S.E.2d at 6. As part of this examination, the *Snakenberg* court – without citation to any legal authority – defined the “intrusion” element of the wrongful intrusion into private affairs tort as follows:

- (1) Intrusion. An intrusion may consist of watching, spying, prying, besetting, overhearing, or other similar conduct. Whether there is an intrusion is to be decided on the facts of each case.

Id. This definition of the intrusion element was interpreted by this Court to mean that “actual viewing” is required to satisfy this element of the tort.

But *Snakenberg* isn’t the last or the most authoritative word on this issue. Instead, in *O’Shea v. Lesser*, 308 S.C. 10, 17–18, 416 S.E.2d 629, 633 (1992), the South Carolina Supreme Court expressly relied upon the language in *Rycroft*, and established under South Carolina law that “actual viewing” is not necessary to satisfy the “intrusion” element of the intrusion into private affairs tort. A close reading of *O’Shea* bears this out. *O’Shea* involved a dispute between

residential property neighbors over construction of an open outdoor deck. After the deck was constructed, the neighbors who built the deck:

can see around appellant's patio wall into a portion of appellant's home from the end of their addition. Appellant asserts that as a result of the Lessers' ability to see into her house, she has been forced to change her lifestyle to avoid being watched by the Lessers.

O'Shea, 308 S.C. at 13–14, 416 S.E.2d at 631. “Can see,” and the “ability to see” into the neighboring house establishes that the intrusion claim asserted wasn’t about “actual viewing,” but rather was about the “ability to see.”

While the South Carolina Supreme Court in *O'Shea* ultimately ruled against the appellant, it did not do so because the court found that actual viewing was required:

Appellant asserts that the master-in-equity erred in finding that appellant suffered no damages even though (1) the Lessers *can see* into her home, thereby allegedly invading her right to privacy, and (2) the improvements to the Lessers' residence allegedly diminish her right to a view. We disagree.

This Court has defined invasion of privacy as:

The unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities, in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities.

Meetze v. The Associated Press, 230 S.C. 330, 95 S.E.2d 606 (1956). Where, as here, a plaintiff bases an action for invasion of privacy on “intrusion,” bringing forth no evidence of public disclosure, it is incumbent upon him to show a blatant and shocking disregard of his rights, and serious mental or physical injury or humiliation to himself resulting therefrom. *Rycroft v. Gaddy*, 281 S.C. 119, 314 S.E.2d 39 (Ct.App.1984).

The fact that the Lessers *can see* into a portion of appellant's home is not so blatant or shocking as to constitute an invasion of appellant's right to privacy. People who live in organized communities must of necessity suffer some inconvenience and annoyance from their neighbors and must submit to annoyances which are the consequence of the reasonable use of property by others. *Winget v. Winn Dixie Stores, Inc.*, 242 S.C. 152, 130 S.E.2d 363 (1963).

O'Shea, 308 S.C. at 17–18, 416 S.E.2d at 633 (emphasis added). Thus, the South Carolina Supreme Court's last pronouncement on the intrusion element of this tort (which postdates *Snakenberg*) is that it is possible to satisfy the intrusion element with the mere ability to see ("can see"), not actual viewing, if the plaintiff shows it is so "blatant or shocking" as to constitute an invasion of the right to privacy. *Id.*

In *O'Shea*, the court didn't find that the mere ability to see was blatant or shocking enough, and chalked it up to "inconvenience and annoyance from the neighbors." However, that doesn't negate the proposition that the South Carolina Supreme Court's formulation of the intrusion element plainly contemplates satisfaction of the intrusion element by the mere "ability to see," if the ability to see is so blatant and shocking as to constitute an invasion of privacy.

The case before this Court presents just such a "blatant and shocking" situation, and is a far cry from the mere inconvenience of having one's neighbors potentially peering into one's windows (a situation easily rectified by putting up window treatments). Here, the undisputed facts demonstrate not only that Defendants "can see" or were able to see Plaintiffs and every other student- in spite of the use of window treatments-but actually "did see" numerous students that were "actually viewed" by Scofield. That is a textbook definition of "blatant and shocking."

There is no case law authority negating this plain language in *O'Shea*. Instead, the only authority that reverts to the *Snakenberg* formulation of the intrusion element is a law student Note. Eli A. Meltz, No Harm, No Foul? "Attempted" Invasion of Privacy and the Tort of Intrusion Upon Seclusion, 83 Fordham L. Rev. 3431 (2015). While the Meltz Note is a fine piece of legal scholarship, it ignores *O'Shea* entirely, and focuses exclusively upon *Snakenberg's* definition of the intrusion element (a definition which, again, is seemingly plucked out of thin air by the South

Carolina Court of Appeals, as there is no authority cited). The Meltz note is simply wrong that South Carolina’s formulation of the intrusion into private affairs cause of action differs from intrusion under the Restatement (Second) of Torts, § 652B, which does not require acquisition of information to recover.¹ Tellingly, the Second Restatement’s formulation of this element (noting that it does not depend on publicity) tracks with the language in *Rycroft*.

What is plain from the language of *O’Shea* and *Rycroft* is that contrary to the conclusion of the Meltz note, South Carolina law is, and always has been, in accord with section 652B of the Second Restatement of Torts, which doesn’t require acquisition of information (“actual viewing”) to recover. See ECF 67, Page 25, n.4 (citing cases from jurisdictions that have expressly adopted section 652B and that hold that a plaintiff need not show actual viewing); *Phillips v. Smalley Maint. Servs., Inc.*, 435 So. 2d 705, 709 (Ala. 1983) (holding that “acquisition of information from a plaintiff is not a requisite element of a § 652B cause of action”). There is also nothing to suggest that the law in South Carolina is any different on this point than the law in those jurisdictions that expressly adopted the Second Restatement construction. South Carolina’s division of the invasion of privacy tort into a “complex” of three separate torts mirrors the Second Restatement’s division of the invasion of privacy tort into 4 separate torts (three of which are the same as in South Carolina). Compare Restatement (Second) of Torts, § 652B (intrusion upon seclusion), § 652C (appropriation of name or likeness), and § 652D (publicity given to private life) with Corder, 283 S.C. at 525, 324 S.E.2d at 82 (recognizing torts of 1) the unwarranted appropriation or exploitation of his personality; or (2) the publicizing of his private affairs with which the public has no legitimate concern; or (3) the wrongful intrusion into one's private activities.

¹ Moreover, a law student note, however expertly written, cannot be the authoritative statement of South Carolina law on the intrusion element.

Also, section 652B of the Second Restatement defines the intrusion tort in this way:

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Restatement (Second) of Torts § 652B (1977). South Carolina defines the same tort this way:

The . . . the wrongful intrusion into one's private activities, in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities.

Meetze, 230 S.C. at 335, 95 S.E.2d at 608. There is no question that the Second Restatement and South Carolina are talking about the same tort. Given *O'Shea* and *Rycroft*, there is equally no question that South Carolina already interprets the identical tort in the same manner, and that “actual viewing” is not required.

The language of the South Carolina Supreme Court’s ruling in *O'Shea* and the *Rycroft* decision is unambiguous. As the South Carolina Supreme Court’s last pronouncement on this element of the tort (which postdates *Snakenberg*), it is possible to satisfy the intrusion element merely with the mere ability to see (“can see”) and not “actual viewing.”

It is undisputable that with the blinds closed (as Defendants testified to), the use of the windows operated as a peep hole per the architect’s admission. Further, the Defendants conceded wholesale monitoring (quite arguably “actual viewing”) of the students through the use of the blind covered windows since the school was built in 1998. The Defendants also *were able to see* their students in a private place that had a legitimate expectation of privacy.

Since “actual viewing” is not required under *O'Shea*, all that is left for Plaintiffs to demonstrate is, “a blatant and shocking disregard of his rights, and serious mental or physical injury or humiliation to himself resulting therefrom,” under *O'Shea* 308 at 17–18, 416 S.E.2d at 633.

Although the Court in its Order did not address or analyze whether the Defendants' ability to see unclothed children without their awareness is "so blatant or shocking as to constitute an invasion of privacy," (the first prong) nor whether a "serious mental or physical injury or humiliation to himself resulting therefrom," (the second prong) occurred, the Plaintiffs have proffered evidence to the Court in the form of the Defendants' own admissions that such activity *does* constitute an invasion of privacy. (See (Dkt. No. 78 at 2); (Dkt. No. 67 at 4-5, 6). That fact alone establishes the "blatant and shocking" first prong. It is also important to note that the windows were utterly useless. Here, the Court's Order is entirely silent on the Defendant's main justification for the use of the windows: safety. The Plaintiffs unassailable evidence proffered to the Court demonstrated that the Defendants failed to present any indica (let alone a compelling evidentiary showing) that overriding safety concerns warranted the use of the windows and its attendant violation of the children's right to privacy. Defendant advanced no justification for the monitoring of the children, because there is none. In fact, there never was any justification for the windows, because the students are being protected today without the use of the viewing windows. This reality makes the use of the windows even more "blatant or shocking as to constitute an invasion of privacy."

The second prong a "serious mental or physical injury or humiliation to himself resulting therefrom," is satisfied with the humiliation both Plaintiffs testified to. Dr. Salas also testified to the mental harm. The Defendants actually acknowledge this second prong of harm in their response brief.² To be blunt and not pejorative, is it not offensive to common sensibilities that the onus is on the Plaintiffs to prove (through "actual viewing") what is inherently an impossible task ? It is

² Dkt #75, P. 5, ¶1. Defendants misquote the standard to omit that a mere "humiliation" qualifies and instead represent to the Court that a "serious mental injury" is required.

an impossible task to prove that each Bishop England student was “actually viewed,” other than through the evidentiary admissions of the school officials that the students were monitored in the locker rooms³. Behind that pragmatic impossibility is the prescient logic of why Courts across the country, and indeed the *O’Shea* court itself, have declined to hold a Plaintiff to the standard of “actual viewing,” or “actual listening,” as cited⁴ in the numerous jurisdictions in Plaintiffs motion for class certification. These courts hold that “actual viewing,” or “actual listening,” is not a required element under the tort because the tort is meant to protect the Plaintiffs’ after the fact mental well-being in an area cloaked with privacy and seclusion. These cases expressly state that an intrusion occurs when the invasion *could have* intruded privacy. *See, e.g. Koepfel v. Speirs*, 808 N.W.2d 177, 182–85 (Iowa 2011)(“ if the fact finder finds from the evidence that the device could have intruded into the privacy of the plaintiff, the element of intrusion is satisfied.”); *Harkey v. Abate*, 131 Mich.App. 177, 346 N.W.2d 74, 76 (1983) (“In our opinion, the installation of the hidden viewing devices alone constitutes an interference with that privacy which a reasonable person would find highly offensive. And though the absence of proof that the devices were utilized is relevant to the question of damages, it is not fatal to plaintiff’s case.”); *Hamberger v. Eastman*, 106 N.H. 107, 206 A.2d 239 (1964)(court held the plaintiffs were not required to prove the defendant actually overheard or viewed the activities in a secluded place to show an intrusion occurred. Instead, it found an intrusion occurs when the defendant performs an act that had the potential to impair a person’s peace of mind and comfort associated with the expectation of privacy).

Had the Court not interpreted South Carolina law as requiring “actual viewing” to establish the tort of intrusion into private affairs, the proposed class of students that were capable of being

³ The Order is silent on addressing these admissions as proof of “actual viewing.”

⁴ See Footnote 4 to Plaintiffs’ Motion for Class Certification.

seen is easily ascertainable (i.e. all students that attended Bishop England High School during the relevant time periods, as set forth in the Plaintiffs' class certification motion).

III. Had the Court Determined "Actual Viewing" is Not Required under the Intrusion Tort, the Plaintiffs Meet the Standing Requirement.

The Court rooted its opinion that Plaintiffs have no constitutional standing likewise on the grounds that they were not "actually viewed," and suffered no harm or injury. In this vein, the Court noted:

Defendants further point out that Plaintiff's expert psychologist testified as follows regarding the harm allegedly suffered by the named viewed plaintiffs:

It's kind of an idea of if I'm driving across a bridge and the bridge collapses, but I made it across the bridge, but the car behind me almost didn't, and the car behind it didn't, I might go on and be okay until I learned, wow, do you realize just how close that was on that day to ending my life. And it's a moment when you take a pause.

Amanda Salas, MD Deposition, (Dkt. No. 75-2 at 82:11-18).

However, the Defendants failed to quote Dr. Salas' immediately following sentences in her testimony. Dr. Salas went on state, and quite clearly, that although some children would not be affected, it is obvious that others would be negatively affected:

And some people may take pause and think about it, reconcile whatever the issue is, and they may not rise to the threshold of coming into a psychiatrist's office or a counselor's office or they may not even go to their pastor about it. And there are other people who have different psychological structure, different life experiences. But this was a high school experience. This high school's kind of a key component in childhood develop [sic]. And the idea that a person who has been in that situation would be affected and it would be negative on their psyche, that's as -- that's as obvious in the world of psychiatry as I'm not gonna find an article that says it's this obvious, because you're also not gonna find an article that says something along the lines of people get pregnant by having intercourse. It's known.

Amanda Salas, MD Deposition, (Dkt. No. 75-2 at 82:19- P. 83: L.12).

Clearly, Dr. Salas' testimony is that some children will have negative psychological affects due to the Defendants actions. This testimony is proof in and of itself that "actual viewing" is not a precursor to sustaining damages, and is another reason why jurisdictions have allowed the intrusion tort without a proof of viewing⁵. Dr. Salas' testimony also directly establishes an injury in fact to the Plaintiffs, specifically traceable to the Defendants' actions. Dr. Salas' opinions were uncontroverted and unchallenged by any other medical physician giving a different opinion to the contrary. It is here that *Snakenburg*'s near strict liability analysis of liability to import damages is consistent with the goals of Plaintiff's proposed class certification of all students at Bishop England that were exposed to the same harm:

In an action for wrongful intrusion into private affairs, **the damage consists of the unwanted exposure** resulting from the intrusion. Thus, if the plaintiff proves the four elements needed to establish his cause of action, **the fact of damage is established as a matter of law**. The amount of damage is then to be assessed by the trier of fact. In assessing the damage, the trier of fact may consider the shame, humiliation, and emotional distress suffered by the plaintiff as compensable elements of damage.

Snakenburg v. Hartford Cas. Ins. Co., 299 S.C. 164, 171–72, 383 S.E.2d 2, 6 (Ct. App. 1989)
(Emphasis added).

Here, *Snakenburg* is consistent with the notion that damages are essentially presumed if the act is committed⁶ and that "the damage consists of the unwanted exposure." Put a different way, if it was South Carolina law that "actual viewing" was required, *Snakenburg* would not set forth that damages were established automatically as a matter of law. To the contrary, *Snakenburg* would require proof of "actual damages," which it does not. Actual damages are awarded to a litigant in compensation for his actual loss or injury. *Austin v. Specialty Transp. Servs., Inc.*, 358

⁵ See also deposition of Male Student 300, "Because they are living in a world of they don't know, which, in some cases, can be worse than knowing." (Dep. Male Student, P. 15, L. 15- P. 16, L. 4, Exhibit #17).

⁶ Compare to the Defendant's use of the bridge analogy where there is no injury for a third party's tort because of 'what might have happened' or 'what could have happened' as stated in Page 11 of Order.

S.C. 298, 311, 594 S.E.2d 867, 874 (Ct. App. 2004). In contradistinction, South Carolina law regarding nominal damages is consistent with *Snakenburg*'s treatment of presumed damages:

The law presumes the existence of at least nominal damages for the violation or infringement of a legal right. *Id.* The fact that substantial damages either were not discovered or did not occur until sometime later is of no consequence. *Id.* The act that is the basis for the action cannot be legally separated from its consequences and successive actions may not be brought as the damages develop. *Id.*; see also *Land v. Neill Pontiac, Incorporated*, 6 N.C.App. 197, 169 S.E.2d 537 (1969) (the cause of action for negligent injury accrues at the time of the invasion of the right and nominal damages, at least, naturally flow from such invasion)

Grooms v. Med. Soc. of S.C., 298 S.C. 399, 402–03, 380 S.E.2d 855, 857 (Ct. App. 1989)

“It follows that a cause of action for damages is not on the one hand the damage suffered by plaintiff, nor on the other hand the mere evidentiary facts showing the defendant's wrong; but it is the wrong itself done by defendant to plaintiff, that is, the breach of duty by the defendant to the plaintiff, **whether it is the duty arising out of a contract or of tort. Every violation of a legal right imports damage and authorizes the maintenance of an action and the recovery of at least nominal damages, regardless of whether any actual damage has been sustained.**”

Livingston v. Sims, 197 S.C. 458, 15 S.E.2d 770, 772 (1941)(emphasis added) *overruled on other grounds* by *Santee Portland Cement Co. v. Daniel Int'l Corp.*, 299 S.C. 269, 384 S.E.2d 693 (1989). See also, *Gordon v. Rothberg*, 213 S.C. 492, 504, 50 S.E.2d 202, 208 (1948)(“Where, as in this case, the legal rights of the respondent had been invaded, the law presumes that he suffered some actual damages, and it was therefore not improper for the trial judge to direct a verdict for such form of damages against the appellants, leaving the amount thereof to be determined by the jury.”)

South Carolina law's treatment of nominal damages is on point with the United States Supreme Court's recent affirmation that nominal damages provide redressability for Article III standing under the United States Constitution: “The law tolerates no farther inquiry than whether there has been the violation of a right.” [citation omitted] When a right is violated, that violation “imports damage in the nature of it” and “the party injured is entitled to a verdict for nominal damages.” *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 800, 209 L. Ed. 2d 94 (2021). “[f]or the purpose of Article III standing, nominal damages provide the necessary redress for a completed

violation of a legal right.” *Uzuegbunam* 141 S. Ct. at 802. Accordingly, Plaintiffs have established standing as they have brought forth testimony of their injuries consistent with the types of damages alleged for invasion of privacy when they were not “actually viewed.”

IV. Had the Court Determined “Actual Viewing” is Not Required under the Intrusion Tort, the Plaintiffs Meet the Predominance Requirement.

As the Court correctly notes, predominance is established when the liability is common to all. *Case v. French Quarter III, LLC*, No. 2:12-cv-2518, 2015 WL 12851717, at *6 (D.S.C. July 27, 2015) (“In mass tort cases, common issues of law and fact have been held to predominate ‘where the same evidence would *resolve* the question of liability for all class members.’”). This Court states on Page 16 of its Order that:

As noted above, to state plausible causes of action, especially as to invasion of privacy, factual questions would need to be resolved for each individual class member. These include whether a class member or a class member’s child was in-fact viewed and the unique “shame, humiliation, and emotional distress suffered by the [class member]” in order to calculate damages.

Order, Dkt # 84, P. 16, ¶2.

As noted above, proof of actual viewing is not required under *O’Shea*, and the evidence proffered to the Court that the students right to privacy was invaded without any justification resolves liability as to all class members, as damages are “established as a matter of law” under *Snakenburg*. Accordingly, the Court’s concern as stated on Page 16 of its Order that, “Whether any student suffered any injury at any time will completely depend on individualized evidence,” is eliminated *a priori* as damages are established to all those who were able to be viewed in the locker rooms.

The only remaining task then under *Snakenburg* is to assess the shame, humiliation, and emotional distress suffered by the plaintiff.” *Snakenberg*, 299 S.C. at 171–72. Simply because individualized determination of damages may be needed does not defeat predominance. *See e.g.*

Bertulli v. Indep. Ass'n of Cont'l Pilots, 242 F.3d 290, 298 (5th Cir.2001) (affirming district court's determination that common issues predominated because “[a]lthough calculating damages will require some individualized determinations, it appears that virtually every issue prior to damages is a common issue”); *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir.1975) (“The amount of damages is invariably an individual question and does not defeat class action treatment.”). Although the Defendants caused psychological damages, they should be no less approachable to quantification and assessment as physical damages. Physical damages and manifestations can be just as myriad and particularized as psychological damages. Such differences that “go primarily to damages . . . cannot destroy predominance.” *Ambriz v. Coca Cola Co.*, No. 14-CV-00715-SVW, 2015 WL 12683823, at *4 (C.D. Cal. Mar. 11, 2015). Thus, issues common to the class predominate.

With regard to the Court’s determination that predominance is not met with regard to the tuition class, the statement by the Court that Plaintiffs have “presented no evidence that the parents of every aspirant to attend Bishop England received or relied on any such statements, or that either the warranty claim...or unjust enrichment claim can be determined for the entire class with common proof”; (Dkt. No. 67 at 26) gives insufficient weight to our history as a people and to Plaintiffs’ earlier requests for student/tuition payer identification. However, the opening line of the Amended Complaint states “Plaintiffs...bring this action in their individual capacities and on behalf of the class...” in all its allegations. (ECF 35 at 1). It is inescapable that just a few years ago on the streets of the various towns and cities of South Carolina, in the department stores, for example, the water fountains and restroom signs read “WHITE” or “WHITE ONLY” and “COLORED” or “COLORED ONLY.” Those signs, just like the statements published by Bishop England High School were published not only to the people in the department store, both black

and white, but to the world, as were the online statements by Bishop England that it was a “moral, caring and safe environment to send one’s child or children.” Clearly, everybody in the proposed class can rely on that statement by the Defendant Bishop England High School/the Diocese Defendants as being made and held out to the entire Tuition Class just as all people of color could understand that they had been required to drink only from a certain water fountain, whether they saw the sign while shopping in the store or only standing outside on the public sidewalk looking through the store’s plate glass window, thirsty or not; the store said it to the world and should be held fully responsible, and BEHS said it offered a “climate of safety, trust, and respect for the individual” to the world and must be held fully responsible for that.

Equally certainly, all Dow implant victims did not have to appear pre-class certification and testify about their reliance on any Defendant’s statement that the implants were safe; nor did the cigarette smokers in the tobacco litigation. The nefarious, misleading, and grossly untrue published statements by BEHS are not made acceptable because they were ostensibly made by holy men and women who ran the high school and the holy men who run the Diocese. Interestingly here, Bishop England has in written discovery said that perhaps 7,500 students appeared before these windows and could have been viewed over the years and the Court in the initial hearing in this matter refused to require the Defendants to provide the Plaintiffs the identifying information in its possession of all of the students who attended the high school during the twenty-one years of viewing activity in question and would not even require that the Diocese provide a statement of which students they contended had not been viewed; this while limiting the number of depositions re: the class certification, Rule 23 issues. Predominance is established on this issue as well.

V. Under the Facts of this Case Superiority is Met.

Finally, had the Court determined that “actual viewing” is not required, class-wide treatment of Plaintiffs claims is the perfect vessel to manage thousands of identical claims, which damages can be addressed in sub-classes or matrices of recognizable damage claims. Collective action is plainly superior in cases involving victims of assault or abuse often do not wish to subject themselves to litigation, whether to avoid making their experience public, having to testify about it, or having to confront their abuser in court. *See, e.g., Doe v. Roman Catholic Diocese of Covington*, No. 03-CI- 00181, 2006 WL 250694, at *5 (Ky. Cir. Ct. Jan. 31, 2016). And as the Court correctly notes, superiority often is met in two situations, either where “many individuals have small damage claims” and where, absent a class suit, “it is unlikely that any of the claims will be accorded relief.” The certification of this class in this case would facilitate a procedural avenue to rectify a wrong to which all students have damages established as a matter of law under *Snakenburg*. If not for the procedural vehicle of the class action, the thousands of students that were violated would not realistically have the “maintenance of an action and the recovery of at least nominal damages, regardless of whether any actual damage has been sustained.” *Livingston*, 197 S.C. at 458. *See also, In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 861 (6th Cir.2013)(stating that “class members are not likely to file individual actions—the cost of litigation would dwarf any potential recovery”).

WHEREFORE, Plaintiffs respectfully request that this Court reconsider and vacate its denial of Plaintiffs’ Motion for Class Certification, and grant Plaintiffs’ Motion for Class Certification, for the reasons stated herein and in Plaintiffs’ class certification motion.

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

Gary Nestler, Viewed Student
Female 200, Viewed Student Male 300,
on behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

The Bishop of Charleston, a Corporation
Sole, Bishop England High School,
Tortfeasors 1-10, The Bishop of the
Diocese of Charleston, in his official
capacity, and Robert Guglielmone,
individually,

Defendants.

Civil Action No. 2:21-613-RMG

**PLAINTIFFS' MOTION TO
CERTIFY QUESTION TO THE
SUPREME COURT OF
SOUTH CAROLINA**

TO: ATTORNEYS FOR THE DEFENDANT, AND TO THE ABOVE-NAMED DEFENDANTS:

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorneys for the Plaintiffs Gary Nestler, Viewed Student Female 200, Viewed Student Male 300, on behalf of themselves and all others similarly situated, will move before the Honorable Richard Mark Gergel, Judge of the U.S. District Court for the District of South Carolina, Charleston Division, for an Order certifying a question to the Supreme Court of South Carolina. The question is set forth in the accompanying Memorandum.

This Motion is made pursuant to Rule 244 of the South Carolina Rules of Appellate Procedure and will be supplemented and supported by such affidavits, depositions, discovery responses, memoranda of law, and such other documents as appropriate.

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
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Female 200, Viewed Student Male 300,
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Defendants.

Civil Action No. 2:21-613-RMG

**PLAINTIFFS' MEMORANDUM IN
SUPPORT OF THEIR MOTION TO
CERTIFY QUESTION TO THE
SUPREME COURT OF
SOUTH CAROLINA**

Plaintiffs Gary Nestler, Viewed Student Female 200, Viewed Student Male 300, on behalf of themselves and all others similarly situated, submit the following Memorandum in support of their Motion to Certify a question to the Supreme Court of South Carolina, pursuant to Rule 244 of the South Carolina Rules of Appellate Procedure.

ARGUMENT

This lawsuit and this legal issue arise out of an egregious set of circumstances whereby current and past Bishop England High School (hereinafter, "BEHS") students were made and required to disrobe, partially or fully, in each of three dressing room / locker rooms, thereby exposing themselves in the locker rooms controlled by Defendants. Each of the locker rooms (boys and girls) were subject to viewing through a large 4' by 4' plate glass window, positioned at desktop height, while students were using the dressing room / locker room facilities at BEHS since

the opening of the school building on Daniel Island in the City of Charleston (approximately September 1, 1998) until May of 2019. The windows were covered with blinds that could be and were controlled and/or manipulated from within the viewing rooms; of course, without warning or knowledge to students or tuition payers. (Amended Complaint, ¶ 16). Plaintiffs allege that BEHS students, who are children using the locker rooms, had a reasonable expectation of privacy in the locker rooms, were unaware that they were being viewed, and that there was no legitimate purpose for use of the windows (Amended Complaint, ¶¶ 5, 16, 17, 18, 55, 68-73, 115-120, ECF 35).

There is evidence of which this Court may take judicial notice that numerous students were actually video recorded while at BEHS via the windows described above. *See* Transcript of Record, State of South Carolina v. Jeffrey Alan Scofield, Case No. 2019-GS-08-01294 (General Sessions Court, Berkeley County, South Carolina June 9, 2020) at pages 8-9.¹ After the window and viewing information became public as a result of a Defendant employee voyeur, Jeffrey Scofield, Defendants covered the windows with plywood within a matter of hours, this after being in place and surreptitiously used to view nude and/or partially nude children for more than twenty years. (Amended Complaint, ¶ 17). At some point, and in the face of written notification not to allow or take part in the spoliation of the subject windows, evidence, the Defendants removed them and threw them away, the temporary plywood coverings were removed and the viewing portals were permanently bricked in with cement blocks and painted to match the existing walls. (Dep. Mary Tucker, P. 30, L. 18 -P. 31, L. 19, Exhibit #1).

The school's use of the viewing windows to monitor students in the locker rooms invaded

¹ The transcript from the Scofield sentencing hearing is attached hereto as Exhibit A, and is made part of the record for purposes of this motion.

their privacy. The use of the viewing windows was common to all students that attended Bishop England High School since 1998 when the school was constructed. All students had to use the locker rooms. Physical Education was a core curriculum requirement for all. All students had a reasonable expectation of privacy in the locker rooms. The students' privacy was violated through the use of the windows. There were no safety concerns at Bishop England- ever- to warrant the installation of the windows or their use. Further, as learned through discovery, there were never any incidents of safety captured through the monitoring of the children, from the time of installation of the windows through the removal. Even if the windows were justified at the time of the installation- which is denied- the decades long "monitoring" of naked children, under the guise of "safety" is blatant, shocking, disgusting, and reprehensible; particularly so in light of the Defendants' long history of acts of child sex abuse and coverup of same for decades.

Plaintiffs moved for class certification December 13, 2021. ECF 67. The Plaintiffs' Motion for Class Certification (ECF 67), attached all of the supporting evidence and documentation (ECF Nos. 67-1, 67-2, 67-3, 67-4, 67-5, 67-6, 67-7, 67-8, 67-9, 67-10, 67-11, and 67-1), and Plaintiffs' Reply to Defendants' Objection to the Motion for Class Certification (ECF 78) are incorporated herein by reference, and are hereby made part of the record in this request for certification.

On March 24, 2022, this Court denied the Plaintiffs' Motion for Class Certification, holding that no class was due to be certified because: A) the class wasn't ascertainable, B) the Plaintiffs' lacked standing; C) the Plaintiffs failed to demonstrate predominance, and D) the Plaintiffs failed to demonstrate superiority. See generally ECF 84. The Court's Order denying certification is also made part of the record in this request for certification.

The lynchpin of three of the bases upon which the Court denied the motion for class certification is a single legal question – whether under South Carolina law, the tort of wrongful

intrusion into private affairs requires proof of actual viewing. This legal question is central to the Court's ascertainability (ECF 84 at 7), constitutional standing (*Id.* at 13), and predominance (*Id.* at 16) analyses, all of which rest upon the Court's conclusion that proof of actual viewing is required in order to establish the intrusion tort.

South Carolina case law is scant when it comes to this question. The broad invasion of privacy tort was first recognized in South Carolina in *Holloman v. Life Ins. Co. of Virginia*, 192 S.C. 454, 7 S.E.2d 169 (1940). In *Holloman*, the South Carolina Supreme Court stated:

The right of privacy is one which was not definitely recognized by the law until comparatively recent times. But we find ourselves in agreement with a number of authorities to the effect that the violation of such a right is under certain circumstances a tort which would entitle the injured person to recover damages. But the right of privacy is correctly defined in 21 R.C.L. 1196 as "the right to be let alone; the right of a person to be free from unwarranted publicity". Or more specifically but less accurately, "the right to live without one's name, picture or statue, or that of a relative, made public against his will".

Holloman, 7 S.E.2d at 171. Notably, this plain language from *Holloman* strongly suggests that the initial recognition in South Carolina of the broader tort of invasion of privacy only included one of the "sub-torts" – the "public disclosure of private affairs" tort.

Further recognition and expansion of the invasion of privacy tort by the Supreme Court of South Carolina came in *Meetze v. Associated Press*, 230 S.C. 330, 335, 95 S.E.2d 606, 608 (1956), where the court stated:

The 'right of privacy' has been defined as the right of an individual to be let alone, to live a life of seclusion, to be free from unwarranted publicity. 77 C.J.S., Right of Privacy, § 1; 41 Am.Jur., Privacy, Section 2. The following has been suggested as a fairly comprehensive definition of what constitutes an actionable invasion of the right of privacy: 'The unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities, in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities.' 41 Am.Jur., Privacy, Section 2; *Continental Optical Co. v. Reed*, 119 Ind.App. 643, 86 N.E.2d 306, 14 A.L.R.2d 743; *Smith v. Doss*, 251 Ala. 250, 37 So.2d 118. The existence of a legal right of privacy is recognized by

the American Law Institute in the following language: ‘A person who unreasonably and seriously interferes with another's interests in not having his affairs known to others or his likeness exhibited to the public is liable to the other.’ 4 Restatement, Torts, Section 867.

Meetze is thus the first South Carolina case that recognized three separate sub-torts under the broader invasion of privacy tort – unwanted appropriation, public disclosure, and intrusion. Notably, in adopting this formulation of the invasion of privacy tort, the South Carolina Supreme Court relied upon the original Restatement of Torts, demonstrating that South Carolina generally looks with favor upon the Restatement formulations of the law.

The South Carolina Court of Appeals provided additional refinement. Relying upon *Meetze*, two 1984 Court of Appeals’ decisions in *Rycroft v. Gaddy*, 281 S.C. 119, 124–25, 314 S.E.2d 39, 43 (Ct. App. 1984) and *Corder v. Champion Rd. Mach. Int’l Corp.*, 283 S.C. 520, 525, 324 S.E.2d 79, 82 (Ct. App. 1984) articulated the invasion of privacy tort this way:

In order to state a cause of action for this tort the plaintiff must allege: (1) the unwarranted appropriation or exploitation of his personality; or (2) the publicizing of his private affairs with which the public has no legitimate concern; or (3) the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.

Rycroft and *Corder* made plain that there are three separate “sub-torts” (or “complex of several torts,” as this Court wrote in *Shorter v. Retail Credit Co.*, 251 F. Supp. 329, 330 (D.S.C. 1966)) under the broader tort of invasion of privacy, just as the South Carolina Supreme Court in *Meetze* recognized. This formulation of the invasion of privacy tort was also used in *Wright v. Sparrow*, 298 S.C. 469, 471, 381 S.E.2d 503, 505 (Ct. App. 1989).

The Court of Appeals in *Rycroft* went on to set forth the required elements of the intrusion into private affairs claim. The *Rycroft* court held that:

When a plaintiff bases an action for invasion of privacy on “intrusion” alone, bringing forth no evidence of public disclosure, it is incumbent upon him to show a blatant and shocking disregard of his rights, and serious mental or physical injury

or humiliation to himself resulting therefrom. *Shorter v. Retail Credit Co.*, 251 F. Supp. 329 (D.S.C.1966).

Rycroft, 281 S.C. at 124–25, 314 S.E.2d at 43. The *Rycroft* court’s statement “bringing forth no evidence of public disclosure” is a recognition that “public disclosure” is not a necessary element of the intrusion tort, if a plaintiff can show “a blatant and shocking disregard of his rights, and serious mental or physical injury or humiliation to himself resulting therefrom.” This tracks in complete harmony with the Second Restatement of Torts § 652(B), which does not require acquisition of information for the intrusion tort. *See* Restatement (Second) of Torts § 652B cmt. a (1977) (explaining that the form of invasion of privacy covered by intrusion upon seclusion—consists solely of an intentional interference with the plaintiff’s seclusion and does not depend on publicity given to the plaintiff’s private affairs).

The 1989 Court of Appeals decision in *Snakenberg v. Hartford Cas. Ins. Co.*, 299 S.C. 164, 171, 383 S.E.2d 2, 6 (Ct. App. 1989) is the next case where South Carolina courts examined the intrusion into private affairs claim. *Snakenberg* is an “actual viewing” case, where the plaintiff concealed a video tape camera and recorder in a dressing room and was filming and recording teenage girls changing from swimsuit to swimsuit. *Snakenberg*, 299 S.C. at 167, 383 S.E.2d at 4. As an “actual viewing” case, there was no reason for the *Snakenberg* court to consider the question of whether or not “actual viewing” is a required element of the intrusion tort. Nevertheless, the *Snakenberg* court undertook the task of examining the “nature and scope” of the intrusion tort. *Id.*, 299 S.C. at 171, 383 S.E.2d at 6. As part of this examination, the *Snakenberg* court – without citation to any legal authority – defined the “intrusion” element of the wrongful intrusion into private affairs tort as follows:

- (1) Intrusion. An intrusion may consist of watching, spying, prying, besetting, overhearing, or other similar conduct. Whether there is an intrusion is to be decided on the facts of each case.

Id. This definition of the intrusion element was interpreted by this Court to mean that “actual viewing” is required to satisfy this element of the tort.

But *Snakenberg* isn’t the last or the most authoritative word on this issue. Instead, in *O’Shea v. Lesser*, 308 S.C. 10, 17–18, 416 S.E.2d 629, 633 (1992), the South Carolina Supreme Court expressly relied upon the language in *Rycroft*, and established under South Carolina law that “actual viewing” is not necessary to satisfy the “intrusion” element of the intrusion into private affairs tort. A close reading of *O’Shea* bears this out. *O’Shea* involved a dispute between residential property neighbors over construction of an open outdoor deck. After the deck was constructed, the neighbors who built the deck:

can see around appellant's patio wall into a portion of appellant's home from the end of their addition. Appellant asserts that as a result of the Lessers' ability to see into her house, she has been forced to change her lifestyle to avoid being watched by the Lessers.

O’Shea, 308 S.C. at 13–14, 416 S.E.2d at 631. “Can see,” and the “ability to see” into the neighboring house establishes that the intrusion claim asserted wasn’t about “actual viewing,” but rather was about the “ability to see.”

While the South Carolina Supreme Court in *O’Shea* ultimately ruled against the appellant, it did not do so because the court found that actual viewing was required:

Appellant asserts that the master-in-equity erred in finding that appellant suffered no damages even though (1) the Lessers *can see* into her home, thereby allegedly invading her right to privacy, and (2) the improvements to the Lessers' residence allegedly diminish her right to a view. We disagree.

This Court has defined invasion of privacy as:

The unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities, in such manner as to

outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities.

Meetze v. The Associated Press, 230 S.C. 330, 95 S.E.2d 606 (1956). Where, as here, a plaintiff bases an action for invasion of privacy on “intrusion,” bringing forth no evidence of public disclosure, it is incumbent upon him to show a blatant and shocking disregard of his rights, and serious mental or physical injury or humiliation to himself resulting therefrom. *Rycroft v. Gaddy*, 281 S.C. 119, 314 S.E.2d 39 (Ct.App.1984).

The fact that the Lessers *can see* into a portion of appellant's home is not so blatant or shocking as to constitute an invasion of appellant's right to privacy. People who live in organized communities must of necessity suffer some inconvenience and annoyance from their neighbors and must submit to annoyances which are the consequence of the reasonable use of property by others. *Winget v. Winn Dixie Stores, Inc.*, 242 S.C. 152, 130 S.E.2d 363 (1963).

O'Shea, 308 S.C. at 17–18, 416 S.E.2d at 633 (emphasis added). Thus, the South Carolina Supreme Court's last pronouncement on the intrusion element of this tort (which postdates *Snakenberg*) is that it is possible to satisfy the intrusion element with the mere ability to see (“can see”), not actual viewing, if the plaintiff shows it is so “blatant or shocking” as to constitute an invasion of the right to privacy. *Id.*

In *O'Shea*, the court didn't find that the mere ability to see was blatant or shocking enough, and chalked it up to “inconvenience and annoyance from the neighbors.” However, that doesn't negate the proposition that the South Carolina Supreme Court's formulation of the intrusion element plainly contemplates satisfaction of the intrusion element by the mere “ability to see,” if the ability to see is so blatant and shocking as to constitute an invasion of privacy.

The case before this Court presents just such a “blatant and shocking” situation, and is a far cry from the mere inconvenience of having one's neighbors potentially peering into one's windows (a situation easily rectified by putting up window treatments). Here, the undisputed facts demonstrate not only that Defendants “can see” or were able to see Plaintiffs and every other

student-in spite of the use of window treatments- but actually “did see” numerous students that were “actually viewed” by Scofield. That is a textbook definition of “blatant and shocking.”

There is no case law authority negating this plain language in *O’Shea*. Instead, the only authority that reverts to the *Snakenberg* formulation of the intrusion element is a law student Note. Eli A. Meltz, No Harm, No Foul? “Attempted” Invasion of Privacy and the Tort of Intrusion Upon Seclusion, 83 Fordham L. Rev. 3431 (2015). While the Meltz Note is a fine piece of legal scholarship, it ignores *O’Shea* entirely, and focuses exclusively upon *Snakenberg’s* definition of the intrusion element (a definition which, again, is seemingly plucked out of thin air by the South Carolina Court of Appeals, as there is no authority cited). The Meltz note is simply wrong that South Carolina’s formulation of the intrusion into private affairs cause of action differs from intrusion under the Restatement (Second) of Torts, § 652B, which does not require acquisition of information to recover.² Tellingly, the Second Restatement’s formulation of this element (noting that it does not depend on publicity) tracks with the language in *Rycroft*.

What is plain from the language of *O’Shea* and *Rycroft* is that contrary to the conclusion of the Meltz note, South Carolina law is, and always has been, in accord with section 652B of the Second Restatement of Torts, which doesn’t require acquisition of information (“actual viewing”) to recover. See ECF 67, Page 25, n.4 (citing cases from jurisdictions that have expressly adopted section 652B and that hold that a plaintiff need not show actual viewing); *Phillips v. Smalley Maint. Servs., Inc.*, 435 So. 2d 705, 709 (Ala. 1983) (holding that “acquisition of information from a plaintiff is not a requisite element of a § 652B cause of action”). There is also nothing to suggest that the law in South Carolina is any different on this point than the law in those jurisdictions that

² Moreover, a law student note, however artfully written, cannot be the authoritative statement of South Carolina law on the intrusion element.

expressly adopted the Second Restatement construction. South Carolina's division of the invasion of privacy tort into a "complex" of three separate torts mirrors the Second Restatement's division of the invasion of privacy tort into 4 separate torts (three of which are the same as in South Carolina). *Compare* Restatement (Second) of Torts, § 652B (intrusion upon seclusion), § 652C (appropriation of name or likeness), and § 652D (publicity given to private life) with *Corder*, 283 S.C. at 525, 324 S.E.2d at 82 (recognizing torts of 1) the unwarranted appropriation or exploitation of his personality; or (2) the publicizing of his private affairs with which the public has no legitimate concern; or (3) the wrongful intrusion into one's private activities.

Also, section 652B of the Second Restatement defines the intrusion tort in this way:

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Restatement (Second) of Torts § 652B (1977). South Carolina defines the same tort this way:

The . . . the wrongful intrusion into one's private activities, in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities.

Meetze, 230 S.C. at 335, 95 S.E.2d at 608. There is no question that the Second Restatement and South Carolina are talking about the same tort. Given *O'Shea* and *Rycroft*, there is equally no question that South Carolina already interprets the identical tort in the same manner, and that "actual viewing" is not required.

While the language of the South Carolina Supreme Court's ruling in *O'Shea* and the *Rycroft* decision is unambiguous, the Court of Appeals decision in *Snakenberg* muddies the waters sufficiently to warrant certification. Given the critical importance of this single legal issue to three issues relating to class certification (ascertainability, standing, and predominance), and the broader

need for the Supreme Court of South Carolina to definitively articulate the elements of the tort of intrusion into private affairs, this Court should certify this question.

CONCLUSION

For the reasons set forth above, and based on the arguments submitted in briefing the motion for class certification (ECF 67), which are incorporated herein, Plaintiffs hereby request that the following question be certified to the Supreme Court of South Carolina:

Under South Carolina law, does the tort of intrusion upon seclusion require acquisition of information, or actual viewing, to be actionable, if the plaintiff shows the intrusive act is so blatant or shocking as to constitute an invasion of appellant's right to privacy?

Respectfully submitted,

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2:21-cv-00613-RMG Date Filed 04/21/22 Entry Number 89-2 Page 1 of 18

EXHIBIT A

1 STATE OF SOUTH CAROLINA) GENERAL SESSIONS COURT
2 COUNTY OF BERKELEY) CASE NO. 2019-GS-08-01294
3 STATE OF SOUTH)
4 CAROLINA,) Transcript of Record
5 Plaintiff,)
6 vs.) Date: June 9, 2020
7 JEFFREY ALAN SCOFIELD,)
8 Defendant.)

9 * * * * *

10 B E F O R E:

11 The Honorable Roger M. Young
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21
22 Denise J. Lauder, RPR
23 Ninth Judicial Circuit
24
25

1 A P P E A R A N C E S

2

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8

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9 INDEX OF EXHIBITS

10

11 (No exhibits were offered or
12 marked for identification.)

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1 (The following proceedings were had
2 June 9, 2020, via the Virtual Courtroom, Berkeley
3 County General Sessions Court, Judge Young, State
4 v. Scofield, 2:28 p.m.)

5 THE COURT: Mr. Scofield. Where is
6 Mr. Scofield?

7 MS. LITTLEJOHN: He's in BCPD.

8 THE COURT: All right. Is that him
9 with the Berkeley PD Probook?

10 MS. LITTLEJOHN: It is, Your Honor.

11 THE COURT: Are you Alan -- Jeffrey
12 Alan Scofield?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: All right. Mr. Scofield,
15 I'm told that you want to plead guilty to
16 voyeurism. Communicating obscene messages to
17 another person without consent is what is on the
18 sentencing sheet. Is that the formal name for
19 voyeurism?

20 MR. COLLIER: No, Your Honor. There
21 might be a typo on the sentence sheet.

22 THE COURT: Okay.

23 MR. COLLIER: It's the correct -- it's
24 the correct statute number, Your Honor, but I
25 inadvertently put the incorrect name of the crime.

1 If it's okay with Debbie, if you could cross
2 through communicating obscene messages to another
3 person and write voyeurism. I think that would
4 solve the problem.

5 MS. LITTLEJOHN: I'm fine with that.

6 MR. COLLIER: It's the correct CDR code
7 as well, Judge.

8 EXAMINATION

9 BY THE COURT:

10 Q. Okay. So you want to plead guilty to
11 voyeurism, 0 to 3 years? Mr. Scofield?

12 A. Yes, sir.

13 Q. All right. Well, we normally do these
14 in the courtroom and we are not in the courtroom as
15 you can tell, so in order for me to take your plea,
16 you have to give up your right to have this done in
17 the courtroom. Are you all right with that?

18 A. I am.

19 Q. Now, we normally -- again, your lawyer
20 would be there beside you, but she is participating
21 on video. Raise your hand, Mrs. Littlejohn.

22 Do you see her there?

23 A. I do.

24 Q. If you need to talk with her during
25 this process, you just raise your hand and get my

1 attention and we will let her call you and you can
2 arrange to talk with her more privately. Okay?

3 A. Okay.

4 Q. Okay. Well, in the meantime, you have
5 to give up your right to a jury trial. When you
6 give up your right to a jury trial by pleading
7 guilty. If you want a trial, stop me and we will
8 arrange that for you.

9 State then has to present enough
10 evidence to convince 12 jurors that you are guilty
11 beyond a reasonable doubt. All 12 have to agree
12 that you are guilty in order to convict you, and if
13 convicted, you would have the right to appeal.

14 You could challenge the State's
15 evidence and put up evidence of your own; testify
16 if you want. If you don't want to testify, the
17 judge would tell the jury not to hold that against
18 you while deliberating. Do you understand those
19 rights?

20 A. I do.

21 Q. Do you want to give those rights up and
22 plead guilty?

23 A. Yes.

24 Q. Are you pleading guilty to this charge
25 because you are guilty of it?

1 A. Yes.

2 Q. Are you under the influence of drugs or
3 alcohol today?

4 A. No.

5 Q. Do you need any more time with your
6 lawyer?

7 A. No.

8 Q. Are you satisfied with her
9 representation?

10 A. Yes.

11 Q. Anybody promise you anything or
12 threaten you to plead guilty, other than they are
13 dropping another count of voyeurism?

14 A. No.

15 Q. How old are you?

16 A. Thirty-three.

17 Q. How far did you get in school?

18 A. I have a master's.

19 Q. And do you have a job?

20 A. Not currently.

21 Q. Did you have a job?

22 A. I did.

23 Q. What did you do?

24 A. I was the sports information director
25 at Bishop England High School for five years.

1 Q. Are you married?

2 A. No.

3 Q. Do you have children?

4 A. No, I do not.

5 THE COURT: Ms. Littlejohn, does he
6 understand what he's doing?

7 MS. LITTLEJOHN: Absolutely, Your
8 Honor.

9 THE COURT: All right. I find that his
10 plea is freely, voluntarily, and intelligently
11 made. What would the State like to tell me about
12 this case?

13 MR. COLLIER: Thank you, Your Honor.
14 David Collier for the attorney general's office.

15 I would like to add that voyeurism is a
16 mandatory sex offender registry charge.

17 Your Honor, in the spring of 2019,
18 several students at Bishop England High School,
19 which is on Daniel Island in Berkeley County, were
20 using a school-owned iPad to record an athletic
21 event. Apparently this iPad was shared among the
22 students and staff for this type of purpose.

23 The students at some point looked
24 through the camera roll on the iPad and found
25 several videos of boys who attended Bishop England

1 High School changing clothes in the boy's locker.
2 In the video the boys were never fully nude, but
3 they were in their boxer shorts.

4 On the camera roll of the iPad, the
5 students also found nude photos of the defendant
6 Jeffrey Alan Scofield. Mr. Scofield was then an
7 employee of Bishop England and served as attendance
8 clerk and also assisted in the athletic department.

9 The students quickly turned the iPad in
10 to the school administrators and the administrators
11 contacted the City of Charleston Police Department.

12 Mr. Scofield was interviewed by the
13 City of Charleston investigators, and he confessed
14 to placing the iPad in a window that faced the
15 boy's locker room and to secretly making the videos
16 of the boys while they changed clothes.

17 With the assistance from homeland
18 security investigations, a forensic examination was
19 conducted on the school iPad and on Mr. Scofield's
20 personal iPhone. Those examinations led to the
21 identification of five victims in the locker room
22 videos.

23 The boys were never nude in those
24 videos, but they were changing their clothes with
25 towels and in their underwear. The defendant was

1 arrested after the interview. And after he was
2 arrested, Investigator Brittany Harwell with the
3 City of Charleston secured a search warrant to look
4 for additional electronic devices at Mr. Scofield's
5 home.

6 Investigator Harwell is a member of the
7 attorney general's Internet Crimes Against Children
8 Task Force. Ms. Harwell seized five electronic
9 devices which were then forensically examined by
10 chief forensic investigator Chris Bobar with the
11 attorney general's Internet Crimes Against Children
12 unit, but, Your Honor, Investigator Bobar did not
13 find any additional files of interest in the case
14 on those devices.

15 These are the facts from the State,
16 Your Honor, and the defendant does not have a
17 record.

18 THE COURT: All right. And what is
19 your recommendation?

20 MR. COLLIER: No recommendation.

21 THE COURT: Ms. Littlejohn.

22 MS. LITTLEFIELD: Yes, Your Honor. As
23 you heard Mr. Scofield is 33 years of age and
24 attorney general's office is actually prohibited
25 from giving a recommendation.

1 This is a case we referenced to you
2 several weeks ago. Mr. Scofield fully cooperated.
3 He handed over everything that there was, and you
4 heard that the AG's office thinks there was nothing
5 additional found.

6 When we were preparing for cases to
7 come in, I said -- he, David Collier of the
8 attorney general office called and said, what do
9 you want to do with Mr. Scofield? Just kind of a
10 little bit of a risk thing to do. I said, why not?
11 Let's go ahead and do him.

12 And I asked him about it. I said, you
13 will have to come into our office because you're
14 allowed to have certain things. And so you can see
15 he's here in the public defender's office. Took a
16 while to get him into the office.

17 He has always been very cooperative
18 with our office. He was cooperative with the
19 police. He was cooperative with the attorney
20 general's office, et cetera. During the day he
21 helps his sister. She has lost both of her legs to
22 diabetes and he helps her out a lot.

23 So, Your Honor, we would just ask for a
24 probationary sentence. He does know he will be
25 very, very limited because being on the sex

1 offender registry, and I know the Court is very
2 much aware of how much that limits him.

3 This is a major embarrassment to him.
4 He had great potential and now he's having to
5 figure out what to do with his life at middle age
6 if you will, 33.

7 THE COURT: All right. Well, before I
8 hear from Mr. Scofield, were there members of the
9 victims' families that wanted to be heard or
10 they're just listening in?

11 MR. COLLIER: Your Honor, they are just
12 listening.

13 THE COURT: Okay. All right. Well,
14 Mr. Scofield, what would you like to tell me?

15 THE DEFENDANT: I would like to say
16 that I was just, obviously -- well, obviously, but
17 I was going through different things at that time
18 and really -- really where these thoughts came from
19 to do this was -- was not something that I -- have
20 even been able to figure out until now.

21 I didn't have these thoughts three
22 months before this happened or three years before
23 this happened. I can tell you that when I started
24 having thoughts about doing this, that I would have
25 these arguments in my head with myself because I

1 knew how wrong it was.

2 And I wish I could have had the courage
3 or trust in someone to go to someone about the
4 thoughts I was having because I probably could have
5 stopped this from happening, but I was obviously
6 embarrassed about telling somebody about these
7 types of things.

8 And, honestly, I think that's why in my
9 interview with the detective at the end I told him
10 I was relieved and not take part -- telling him
11 that was -- fact that I was finally able to tell
12 somebody kind of what I was battling for those few
13 weeks or months or so in my head.

14 I can honestly say ever since I was --
15 I got that out that I haven't had any thoughts
16 anymore close to that sense, nor do I plan to have
17 them in the future. I'm just really embarrassed
18 and ashamed for any type of embarrassment I brought
19 on to the victims in this case. Just really,
20 really hope to find a way to move forward from here
21 on out.

22 THE COURT: All right. Well, here's
23 what I'm going to do. I will give you a
24 probationary sentence and order you to undergo
25 mental health counseling.

1 If you are not being prosecuted for
2 your sexual orientation, I mean, it sounds to me
3 like if you're interested in taking pictures of
4 boys, you might very well be gay. Whether or not
5 you have come to that, I don't know, but what you
6 are prosecuted for is taking pictures of young
7 people who they don't give their consent and that's
8 against the law. That is something that you need
9 help with.

10 The State's not prosecuting you because
11 you may or may not be gay. They are prosecuting
12 you for taking pictures of a sexual nature with
13 people that do not give their consent.

14 So that's the thing that needs to be
15 addressed by you in my opinion. And so I will give
16 you two years in the Department of Corrections,
17 suspended upon you successfully completing 18
18 months of probation.

19 And while you are on probation I want
20 you to get some mental health counselling so that
21 you can talk to somebody about -- when you say
22 you're having -- you were -- you had some thoughts,
23 I assume that you were talking about photographing
24 people.

25 And that is something that is clearly

1 unacceptable behavior, especially people without
2 their consent.

3 And if they're under age and of a
4 sexual nature, that is something that you need to
5 learn to do something about and control if you got
6 these urges again.

7 The other thing, you know, that's --
8 you are going to have to work your way through
9 whatever issues you have in life, just like
10 everybody else does, but it's the taking pictures
11 of an unauthorized nature and having to deal with
12 those thoughts that obviously you had struggles
13 overcoming. That's what I need you to get help on.

14 MS. LITTLEJOHN: Where do they go to
15 report for probation?

16 PROBATION AGENT: Report immediately to
17 our office, 109 West Main, Moncks Corner.

18 THE COURT: Yeah. Where are you at
19 now?

20 MS. LITTLEJOHN: He's at our office.

21 PROBATION AGENT: We are five minutes
22 away.

23 THE COURT: When you hang up here, you
24 come over to the probation office to see Mr. Davis
25 and get signed up for probation.

1 MS. LITTLEJOHN: The old one, the
2 satellite or the main courthouse?

3 PROBATION AGENT: 109 North Main,
4 health department.

5 THE COURT: Over across from the
6 Subway.

7 PROBATION AGENT: Yes.

8 THE COURT: Do you know where he's
9 talking about? Somebody there can tell you where
10 he's at.

11 THE DEFENDANT: Okay.

12 THE COURT: Good luck.

13 MS. LITTLEJOHN: Thank you.

14 MR. COLLIER: Your Honor, just one
15 thing further from the State. We would ask that
16 during the term of probation that he be prohibited
17 from contacting the victims or their families.

18 THE COURT: Okay.

19 MS. LITTLEJOHN: That's no problem.

20 THE COURT: Okay. No contact with
21 victims or family members of the victim.

22 (These proceedings were concluded at
23 2:42 p.m.)

24

25

1 CERTIFICATE OF REPORTER

2

3 I, Carol Denise Lauder, Registered
4 Professional Reporter and Notary Public for the
5 State of South Carolina at Large, do hereby certify
6 that the foregoing transcript is a true, accurate,
7 and complete record.

8 I further certify that I am neither related
9 to nor counsel for any party to the cause pending
10 or interested in the events thereof.

11 Witness my hand, I have hereunto affixed my
12 official seal this 5th day of June, 2021, at
13 Charleston, Charleston County, South Carolina.

14

15

16

17 S/Carol Denise Lauder
18 Carol Denise Lauder
19 Registered Professional
20 Reporter, CP
My Commission expires
February 27, 2028

21

22

23

24

25

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

CIVIL ACTION NUMBER: 2:21-cv-613-RMG

Gary Nestler, *et al*,

Plaintiffs,

v.

The Bishop of Charleston, a Corporation
Sole, *et al*,

Defendants.

**RESPONSE BY DEFENDANTS IN
OPPOSITION TO PLAINTIFFS' MOTION
FOR RECONSIDERATION PURSUANT TO
FED. R. CIV. P. 59(e)**

Defendants Bishop of Charleston, a Corporation Sole, *et al*., hereby respond in opposition to Plaintiffs' motion for reconsideration pursuant to Fed. R. Civ. P. 59(e). (Dkt. No. 88). For the reasons stated herein, Plaintiffs' motion should be denied.

BACKGROUND

The Court's Order and Opinion denying Plaintiffs' motion for class certification sets forth a clear and concise recitation of the facts and procedural posture of the case, which need not be repeated. (*See* Dkt. No. 84 at 1-3). Following denial of the class certification motion, Plaintiffs moved for reconsideration pursuant to Fed. R. Civ. P. 59(e). (Dkt. No. 88). The gravamen of Plaintiffs' eighteen-page supporting memorandum is simple: that the Court misunderstood and misapplied South Carolina law construing the tort of invasion of privacy. In reality, however, it is Plaintiffs' reading of the law that is incorrect, and their motion is nothing more than disagreement with the result. Inasmuch as the Court correctly held that South Carolina law "explicitly requires that information about the victim be acquired by the defendant for the tort to be actionable. . . .,"

it necessarily follows that Plaintiffs' motion to reconsider should be denied. (Dkt. No. 84 at 9) (citations omitted). But that is not the end of the matter. The Court's Order and Opinion set forth additional fatal flaws that doomed Plaintiffs' quest for class certification, such as Plaintiffs' failure to demonstrate constitutional standing to sue and to establish both predominance and superiority for purposes of Fed. R. Civ. P. 23(b). These mandatory components of class certification are not even addressed in Plaintiffs' motion for reconsideration and serve as an additional basis for the Court to deny rehearing.

LEGAL STANDARD

Relief pursuant to Federal Rule of Civil Procedure 59(e) is available only in exceptional circumstances “(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.” *Addahoumi v. Pastides*, 2018 U.S. Dist. LEXIS 77151 (D.S.C. May 8, 2018) (quoting *Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 290 (4th Cir. 2002) (additional citation omitted). Moreover, “[r]elief under Rule 59(e) is ‘an extraordinary remedy which should be used sparingly.’” *Id.* (internal marks omitted). ‘Mere disagreement does not support a Rule 59(e) motion.’” *Id.* (citations omitted). The decision to deny review of a prior order pursuant to Rule 59(e) rests within the sound discretion of the district court, and such a motion “should not be used as a ‘vehicle for rearguing the law, raising new arguments, or petitioning a court to change its mind.’” *Bowen v. Adidas Am.*, 2021 U.S. Dist. LEXIS 157856 (D.S.C. Aug. 20, 2021)

ARGUMENT

The Court's Order and Opinion correctly determined that Plaintiffs' attempts to certify a class failed in every respect. Most importantly, the Court concluded that South Carolina law on the tort of invasion of privacy requires proof that prospective class members were actually viewed

in the Bishop England locker rooms. (Dkt. No. 84 at 9). Without such a showing, the Court concluded, Plaintiffs failed to demonstrate that the putative class members were ascertainable, that the proposed class representatives had standing or were adequate to pursue the class-related claims, or that they met any of the remaining requirements imposed pursuant to Fed. R. Civ. P. 23. (*See Id.* at 9-20). In light of the most recent pronouncements on the tort of invasion of privacy, the Court’s determinations are correct and militate against rehearing.

I. THE COURT CORRECTLY DETERMINED PLAINTIFFS FAILED TO DEMONSTRATE ASCERTAINABILITY OR STANDING.

Plaintiffs’ initial framing of the putative classes in this case implicitly recognized that actual viewing is required to prevail upon the tort of invasion of privacy. (*See* Dkt. No. 84 at 2) (quoting Dkt. No. 67 at 34-35) (defining the tuition and *viewed* classes as “all those” who may have a claim arising out of being subjected to “monitoring, watching, viewing, spying, prying, besetting, photographing or videotaping. . .”). While they took a different tack in pursuit of class certification and rehearing – that actual viewing is not required – the Court correctly found this evidence is a mandatory element of their invasion of privacy claim.

a. South Carolina Law Requires “Actual Viewing” In Order To Prevail On A Claim For Invasion of Privacy.

The issue of whether an “actual viewing” constitutes an essential element of the tort of invasion of privacy is a key aspect of the Court’s analysis of the issues of ascertainability and standing. Plaintiffs argue the Court got it wrong. Not so. The Court correctly interpreted the leading South Carolina case on this issue, *Snakenberg v. Hartford Casualty Ins. Co.*, 299 S.C. 164, 383 S.E.2d 2 (Ct. App. 1989), to find that “South Carolina law explicitly requires that information about the victim be acquired by the defendant for the tort to be actionable.” (Dkt. No. 84 at 9) (quoting *Snakenberg*, 299 S.C. at 117 (noting that “[a]n intrusion may consist of *watching, spying,*

prying, besetting, overhearing, or other similar conduct” – implicitly requiring the defendant in this particular case to have viewed the plaintiff) (emphasis supplied)). Stated differently, Plaintiffs’ attempt at class certification fails because they cannot demonstrate the putative class representatives or class members were “actually viewed”.

As noted by the Court, South Carolina has never adopted Restatement (Second) of Torts §652B. (Dkt. No. 84 at 8) (citing *Snakenberg*, 299 S.C. at 170-171) (additional citation omitted). Indeed, the tort was recognized as a matter of common law evolution even though “the common law of privacy remains largely undeveloped in South Carolina.” *Snakenberg*, 299 S.C. at 170. What is clear, however, is that one of the required elements is intrusion, which can consist of “watching, spying, prying, besetting, overhearing, or other similar conduct,” the presence of which is “decided on the facts of each case.” *Id.* at 171. Indeed, Plaintiffs framed their putative classes in this manner, taking the position that liability as to both classes depended upon actual “monitoring, watching, viewing, spying, prying, besetting, photographing or videotaping” of students. (Dkt. No. 67 at 33-34) The Court was absolutely correct that the type of conduct enumerated in *Snakenberg* (and asserted by Plaintiffs in their class certification motion) requires an overt and intentional act by the wrongdoer – in this case, actually viewing the putative class members through the locker room window.¹

The cases relied upon by Plaintiffs do nothing to change this requirement, and rehearing should be denied.

b. The Cases Cited By Plaintiffs Are Distinguishable.

¹ The *Snakenberg* Court defined an actionable intentional act as: (1) it is done willingly; (2) and either (2) the actor desires the result of his conduct whatever the likelihood of that result happening; or (3) the actor knows or ought to know the result will follow from his conduct whatever his desire may be as to that result. *Id.* at 172. Under *Snakenberg*’s intent requirement there would necessarily be an actual invasion of privacy as opposed to a possible or conceptual intrusion.

The additional cases cited by Plaintiffs in support of rehearing do not support their assertion that actual viewing is not required in order to prevail on a claim for invasion of privacy. For example, the precise question before the court in *Holloman v. Life Ins. Co. of Virginia*, 192 S.C. 454, 7 S.E.2d 169 (S.C. 1940), was whether “the invasion of privacy by a commercial use of plaintiff’s name against her consent entitle[d her] to damages.” *Id.*, 192 S.C. at 458, 7 S.E.2d at 171. The court addressed the state of the law on the right of privacy and noted the issue is correctly defined as “the right to be let alone; the right of a person to be free from unwarranted publicity.” *Id.* (citation omitted). The court did **not** address invasion of privacy in the context of this case – the possibility (but not the actuality) of being observed in a locker room – or whether the invasion of privacy tort requires that a plaintiff must be ‘actually viewed’ in a state of undress to pursue her claim. Instead, the issue was whether a plaintiff should be compensated when an insurance company issues a policy in her name, against her wishes, and for commercial gain. The case certainly does not recognize “[t]he broad invasion of privacy tort” as contemplated by Plaintiffs. (Dkt. No. 88 at 2).

In *Meetze v. Associated Press*, 230 S.C. 330, 95 S.E.2d 606 (1956), the court expounded upon and formally recognized the tort of invasion of privacy – albeit in a much different context than that presented in this case. Plaintiffs in *Meetze* brought suit for invasion of privacy following news accounts surrounding the birth of their child when his mother was only 12 years old. While the Court cited 4 Restatement of, Torts, Section 867², it also relied on the holding by the South Carolina Court of Appeals in *Holloman*. It also recognized that “[t]he right of privacy is not an

² "A person who unreasonably and seriously interferes with another's interests in not having his affairs known to others or his likeness exhibited to the public is liable to the other." 4 Restatement, Torts, Section 867 *quoted by Meetze v. Associated Press*, 230 S.C. at 335, 95 S.E.2d at 608.

absolute right.” *Meetze*, 230 S.C. at 337, 95 S.E.2d at 609. Rather, the right to privacy must sometimes yield to competing societal interests, such as freedom of speech and freedom of the press. *Id.* The case does not stand for the proposition, urged by Plaintiffs, that South Carolina generally favors adoption of the Restatement to set judicial precedent.³ Nor does *Meetze* stand for the proposition that a plaintiff need not demonstrate she was viewed in a state of undress in order to proceed on her claim for invasion of privacy.

Plaintiffs’ reliance on *Rycroft v. Gaddy*, 281 S.C. 119, 314 S.E.2d 39 (Ct. App. 1984), fares no better. The *Rycroft* Court, relying on *Meetze*, recognized three distinct causes of action under the tort of invasion of privacy: “(1) wrongful appropriation of personality; (2) publicizing of private affairs of no legitimate public concern; and (3) wrongful intrusion into private affairs.” *Id.*, 281 S.C. at 123, 314 S.E.2d at 42. The cause of action at issue in the case, however, was plaintiff’s claim for public disclosure of his private banking information. The court rejected plaintiff’s contention that such disclosure supported a claim for wrongful intrusion. If anything, the *Rycroft* case stands for the proposition that one’s privacy interests in his banking information must yield to a validly issued subpoena and the absolute privilege and immunity that attach to communications in judicial proceedings. *Id.*, 281 S.C. at 124, 314 S.E.2d at 43 (citation omitted). Plaintiffs are simply wrong in their reading of the case. It is correct that ‘public disclosure’ is a required element of a cause of action for publicizing one’s private affairs, though limited to instances in which the public has no legitimate concern. Under *Rycroft*, a wrongful intrusion claim may lie without evidence of public disclosure. Without such evidence, however, the court concluded that a wrongful intrusion plaintiff is subjected to a higher threshold of establishing “a

³ As the Court observed, “Plaintiffs ignore that South Carolina is not a Restatement district for this tort. . . .” (Dkt. No. 84 at 8) (citation omitted).

blatant and shocking disregard of his rights, and serious mental or physical injury or humiliation to himself resulting therefrom.” *Id.* It cannot be read, however, to obviate the requirement that actual viewing is required to proceed with an invasion of privacy claim under the facts of this case.

Plaintiffs again miss the mark in citing *Shorter v. Retail Credit Co.*, 251 F.Supp. 329 (D.S.C. Mar. 16, 1966). That case addressed plaintiffs’ claim that they sustained embarrassment when defendant’s agent came onto their property and asked questions of the wife, but it does not speak to the ‘actually viewed’ issue. Similarly, *Wright v. Sparrow*, 298 S.C. 469, 381 S.E.2d 503 (Ct. App. 1989), is unavailing. That case recites the three causes of action for the tort of invasion of privacy but it only addressed a claim that defendant publicized plaintiff’s private affairs with which the public had no legitimate concern. It did not address a claim for wrongful intrusion or analyze the burden of proof for such a claim.

Plaintiffs simply mis-read *O’Shea v. Lesser*, 308 S.C. 10, 416 S.E.2d 629 (1992). In that case, respondents obtained permission to make certain improvements to their home. Appellant alleged those improvements provided respondents with a view into her home, thereby forcing her to change her lifestyle. She unsuccessfully pursued various causes of action and injunctive relief requiring respondents to remove the renovations. On appeal, she challenged the master-in-equity’s findings that she sustained no damages even though she asserted that her neighbors’ ability to see into her home constituted an invasion of privacy. 308 S.C. at 17.

Plaintiffs rely on *O’Shea* for the proposition that it holds that “‘actual viewing’ is not necessary to satisfy the ‘intrusion’ element of the intrusion into private affairs tort.” (ECF 88 at 5) (emphasis in the original). This reading is in direct contravention of this Court’s correct analysis. (See Dkt. No. 84 at 9) (noting the implicit recognition by the *O’Shea* Court that “information must be obtained about the plaintiff”). *O’Shea* was all about one’s ability to *view* something the plaintiff

didn't want her neighbors to see. Contrary to Plaintiffs' interpretation, the court reiterated the holding in *Rycroft*; that in the absence of evidence of public disclosure, the tort of invasion of privacy based upon intrusion requires plaintiff to show "a blatant and shocking disregard of his rights, and serious mental or physical injury or humiliation to himself resulting therefrom." *O'Shea*, 308 S.C. at 17-18, 416 S.E.2d at 633 (citing *Rycroft*, 281 S.C. at _____, 314 S.E.2d at _____). The holding of the *O'Shea* Court does not support Plaintiffs' proposition that they are relieved of their burden to demonstrate they were actually and intentionally viewed. It's not so much whether there was a situation in which a person could have been viewed⁴. Rather, the Court recognized the reality of the rights to privacy in the context of close quarters, and the *O'Shea* Court affirmed the judgment for the defendant.

The Court correctly applied South Carolina law to determine that Plaintiffs' failure to adduce evidence that Viewed Student Female 200, Viewed Male Student 300, or Nestler's claims arise out of an actual viewing through the locker room window is fatal to class certification. As a result, the Court's ruling should stand, and Plaintiffs' motion for reconsideration should be denied.

II. ADDITIONAL GROUNDS SUPPORT DENIAL OF PLAINTIFFS' MOTION FOR REHEARING.

Plaintiffs' motion for rehearing relies exclusively on the argument that had the Court employed the legal standard they contend is correct – that actual viewing is not required – Plaintiffs would have met their burden of establishing ascertainability, standing, predominance, and superiority. What Plaintiffs fail to address in their briefing is that, even assuming (without

⁴ Once again, this Court noted this distinction in its Order and Opinion denying class certification. See ECF 84 at 9 (quoting *O'Shea*, 308S.C. at 17-18 (implicitly acknowledging information must be obtained about the plaintiff because, where "a plaintiff bases an action for invasion of privacy on 'intrusion,' *bringing forth no evidence of public disclosure* [of the information], it is incumbent upon him to show a blatant and shocking disregard of his rights, and serious mental or physical injury or humiliation to himself resulting therefrom") (emphasis supplied by the Court).

conceding) that actual viewing is not required, class certification remained inappropriate given the Court's determination that "questions or individual proof and damages will predominate over common issues of the litigation." (Dkt. No. 84 at 16) ("These include whether a class member or a class member's child was in-fact viewed *and* the unique 'shame, humiliation, and emotional distress suffered by the [class member]' in order to calculate damages.") (citation omitted). In addition, the Court aptly recognized that "because Plaintiffs' claims turn on individual questions as to each class member, the difficulties in managing this case as a class action would be great." (*Id.* at 19).

Clearly, the Court's decision denying class certification turned on issues separate and apart from its analysis of whether actual viewing is required. As noted in the preceding paragraph, the Court also determined that Plaintiffs failed to satisfy mandatory elements of the Fed. R. Civ. P. 23(b) analysis regarding predominance and superiority. *See* Dkt. No. 84 at 4 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011) ("A party seeking class certification must affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to provide that there are *in fact* sufficient numerous parties, common questions of law or fact, etc.")). Plaintiffs have failed to address why the Court's analysis was wrong, and rehearing should be denied.

CONCLUSION

For the reasons stated herein, Defendants respectfully submit that Plaintiffs have failed to demonstrate that the Court's Order and Opinion (Dkt. No. 84) contains any manifest error of law requiring correction. Accordingly, Plaintiffs' Motion for Reconsideration Pursuant to Fed. R. Civ. P. 59(e) should be denied.

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May 4, 2022

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ATTORNEYS FOR DIOCESE DEFENDANTS

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

CIVIL ACTION NUMBER: 2:21-cv-613-RMG

Gary Nestler, *et al*,

Plaintiffs,

v.

The Bishop of Charleston, a Corporation
Sole, *et al*,

Defendants.

**RESPONSE BY DEFENDANTS IN
OPPOSITION TO PLAINTIFFS' MOTION
TO CERTIFY QUESTION TO THE
SUPREME COURT OF
SOUTH CAROLINA**

Defendants Bishop of Charleston, a Corporation Sole, *et al*., hereby respond in opposition to Plaintiffs' motion for to certify question to the Supreme Court of South Carolina. (Dkt. No. 89). For the reasons stated herein, Plaintiffs' motion should be denied.

BACKGROUND

The Court's Order and Opinion denying Plaintiffs' motion for class certification sets forth a clear and concise recitation of the facts and procedural posture of the case, which need not be repeated. (*See* Dkt. No. 84 at 1-3). Following denial of the class certification motion, Plaintiffs moved for reconsideration pursuant to Fed. R. Civ. P. 59(e) (Dkt. No. 88)¹, as well as a motion to certify question to the Supreme Court of South Carolina (Dkt. No. 89). Both motions raise essentially the same argument: the Court misunderstood and misapplied South Carolina law construing the tort of invasion of privacy. Specifically, Plaintiffs dispute that South Carolina law

¹ Defendants filed a response in opposition to Plaintiffs' motion for reconsideration. (Dkt. No. ???). As the issues in both motions are essentially identical, Defendants incorporate their response in opposition to Plaintiffs' motion for rehearing herein by reference.

“explicitly requires that information about the victim be acquired by the defendant for the tort to be actionable. . . .” (Dkt. No. 84 at 9) (citations omitted). As a result of their fundamental misunderstanding of South Carolina law, Plaintiffs move this Court to certify the following question: “Under South Carolina law, does the tort of intrusion upon seclusion require acquisition of information, or actual viewing, to be actionable, [sic] the plaintiff shows the intrusive act is so blatant or shocking as to constitute an invasion of appellant’s right to privacy?” (Dkt. No. 89-1 at 11). Inasmuch as South Carolina is clear on this question, and because Plaintiffs’ request comes too late, Plaintiffs’ motion to certify should be denied.

ARGUMENT

As noted in its response in opposition to Plaintiffs’ motion for reconsideration (Dkt. No. 88), this Court correctly determined that South Carolina requires actual viewing before Plaintiffs can proceed on their claim for invasion of privacy. *See* Dkt. No. 84 at 8-9 (“South Carolina law explicitly requires that information about the victim be acquired by the defendant for the tort to be actionable.”) (Citations omitted). Where, as here, state law is sufficiently clear and unambiguous, certification is not appropriate. *See Kirven v. cent. States Health & Life Co.*, 2013 U.S. Dist. LEXIS 15101 (D.S.C. Feb. 5, 2013) (“Certification of a question of state law is appropriate when the federal tribunal is required to address a novel issue of local law which is determinative in the case before it.”); *Wellin v. Wellin*, 135 F.Supp.3d 502, 517 (D.S.C. Sept. 30, 2015) (noting that “certification should only be used when available state law is ‘clearly insufficient.’”) (quoting *Roe v. Doe*, 28 F.3d 404, 407 (4th Cir. 1994)). Because the law on this issue is clear, certification is unnecessary and inappropriate. *Kelaher, Connell & Conner, P.C. v. Auto-Owners Ins. Co.*, 440 F.3d 520, 523 n. 1 (D.S.C. Feb. 24, 2020) (assuming the sufficiency of state law, the court should

“take care not to burden [its] state counterparts with [an] unnecessary certification request [].”) (quoting *Boyter v. Commission of Internal Rev. Serv.*, 668 F.2d 1382, 1385 n. 5 (4th Cir. 1981).

Even if certification were appropriate, Plaintiffs’ motion comes too late. As a court in this District has previously determined, a certification request is untimely when it is made after the court has ruled. *See Winfrey v. Am. Fire & Cas. Ins. Co.*, 2018 U.S. Dist. LEXIS 130648, *9 (D.S.C. Aug. 3, 2018) (recognizing that plaintiff’s request for certification of legal questions to the South Carolina Supreme Court, which was made after the court issued its ruling, was untimely) (citing Rule 244 SCACR (“The Supreme Court in its discretion may answer questions of law certified to it by an federal court of the United States . . . if there are involved in any proceeding before that court questions of law of this state which may be determinative of the cause *then pending* in the certifying court.” (emphasis supplied))).

As noted, the Court was aware of Plaintiffs’ argument and engaged in a well-reasoned analysis of applicable South Carolina law in rejecting Plaintiffs’ position that an actual viewing is not required. It was not until after the Court ruled against Plaintiffs that they suggested certification of the question. Plaintiffs untimely certification request therefor amounts to nothing more than mere disagreement with the Court’s Order and Opinion, and their motion to certify should be denied.

CONCLUSION

For the reasons stated herein, Defendants respectfully submit that Plaintiffs have failed to demonstrate any justification for submission of a certified question to the South Carolina Supreme Court in this case. Accordingly, Plaintiffs’ motion to certify (Dkt. No. 89) should be denied.

[Signature page to follow.]

Respectfully submitted,

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May 4, 2022

ATTORNEYS FOR DIOCESE DEFENDANTS

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

Gary Nestler, Viewed Student
Female 200, Viewed Student Male 300,
on behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

The Bishop of Charleston, a Corporation
Sole, Bishop England High School,
Tortfeasors 1-10, The Bishop of the
Diocese of Charleston, in his official
capacity, and Robert Guglielmone,
individually,

Defendants.

Civil Action No. 2:21-613-RMG

**PLAINTIFFS' REPLY
MEMORANDUM IN
SUPPORT OF THEIR MOTION TO
CERTIFY QUESTION TO THE
SUPREME COURT OF
SOUTH CAROLINA**

Plaintiffs Gary Nestler, Viewed Student Female 200, Viewed Student Male 300, on behalf of themselves and all others similarly situated, submit the following Reply Memorandum in further support of their Motion to Certify a question to the Supreme Court of South Carolina, pursuant to pursuant to Rule 244 of the South Carolina Rules of Appellate Procedure.

Plaintiffs seek to certify the following question: under South Carolina law, does the tort of intrusion upon seclusion require acquisition of information, or actual viewing, to be actionable, if the plaintiff shows the intrusive act is so blatant or shocking as to constitute an invasion of appellant's right to privacy?

Defendants incorrectly contend that Plaintiffs' motion to certify this important question "comes too late," because the certification request was made "after the court has ruled." ECF 91

at 3. Defendants rely upon *Winfrey v. Am. Fire & Cas. Ins. Co.*, No. CV 3:16-3275-MBS, 2018 WL 3688483, at *4 (D.S.C. Aug. 3, 2018) in support of this erroneous contention.

Winfrey does not support Defendants' argument. In *Winfrey*, the "ruling" in question was a ruling on a case dispositive motion – a motion to dismiss. The *Winfrey* court's "ruling" was therefore a Dismissal Order that served as a final judgment, and the *Winfrey* plaintiff was seeking relief from that judgment pursuant to Rules 59(e) and 60(b)(5). A final judgment obviously serves to end a case, that cause is no longer pending, and Rule 244 of the South Carolina Rules of Appellate Procedure doesn't apply.

But here, the Court's ruling is on a class certification motion, which is not a case-dispositive motion. This matter is therefore a "cause *then pending*," and within the ambit of Rule 244. Not only that, but the Federal Rules of Civil Procedure make plain that a ruling on a class certification motion is not part of any final judgment of the "cause," by allowing for an interlocutory appeal of a class certification ruling under Rule 23(f).

Winfrey doesn't stand for the blanket rule that moving to certify a question is untimely after any ruling by the court. Rather, *Winfrey* is plainly a case that forecloses the possibility of a collateral attack on a final judgment by way of an untimely certified question. That isn't the case here, where class certification is still very much a live issue in this case, and the "cause" is still pending before this Court.

Plaintiffs' well-reasoned argument for certification demonstrates that state law is not clear and unambiguous on this question, or that it is actually clear and unambiguous in a way that favors Plaintiffs (i.e., South Carolina law is clear that actual viewing is not required for the tort of intrusion upon seclusion). For these reasons, certification to the South Carolina Supreme Court is appropriate and necessary.

Respectfully submitted,

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**United States District Court
District of South Carolina
Charleston Division**

Tuition Payer 100,
Viewed Student Female 200,
Viewed Student Male 300,
on behalf of themselves and all others
similarly situated,

Plaintiffs,

vs.

The Bishop of Charleston, a Corporation
Sole, Bishop England High School,
Tortfeasors 1-10, The Bishop of the Diocese
of Charleston, in his official capacity, and
Robert Guglielmone, individually,

Defendants.

C/A: 2-21-cv-00613-RMG

**PLAINTIFFS' REPLY TO RESPONSE
IN OPPOSITION (ECF 90) TO
MOTION FOR RECONSIDERATION
PURSUANT TO FED. R. CIV. P. 59(e)**

Come now Plaintiffs by and through their undersigned attorneys, and file this Reply to Defendants' Response in Opposition to the Motion for Reconsideration of the Court's March 24, 2022 denial of the Plaintiffs' Motion for Class Certification.

The primary issue facing the Court in this motion is whether under South Carolina law, the tort of wrongful intrusion into private affairs requires proof of actual viewing. However, Plaintiffs remind the Court that the Defendants themselves have acknowledged that:

A. The purpose of the viewing windows was to monitor, view, the Bishop England High School students during their use of the locker/dressing room facilities. (See Exhibit 1 – Press

Release from the Diocese of Charleston 2.4.21)

B. The foregoing was accomplished at least by faculty, staff, and employees of Defendants. (See Exhibit 2 – Finneran Depo 10.5.21 P. 60, L 24 – P. 61, L. – 2)

C. Defendants estimate as many as 7500 student locker/dressing room users may have been so viewed. (See Exhibit 3 – BEHS Discovery Responses)

D. Numerous students were actually video recorded while at BEHS via the viewing windows. (See Transcript of Record, State of South Carolina v. Jeffrey Alan Scofield, Case No. 2019-GS-08-01294 (General Sessions Court, Berkeley County, South Carolina June 9, 2020) at pages 8-9.

E. All of this occurred with no viewing/monitoring promulgated policy, directives, or accountability whatsoever. (See Exhibit 4 - Finneran Depo Testimony 30(b)(6) Depo Testimony of Finneran 10.22.21 P. 51, L 21 –25, P. 52, L. 7-21, and P. 78, L. 9-13)

F. Counsellors would be available to students/facility users right away and even on an ongoing basis (See Exhibit 5 - Finneran correspondence)

This egregious misconduct – misconduct that Defendants themselves acknowledge – forms the backdrop for the Court’s consideration of the instant motion.

1. *Snakenberg* is Not the Controlling Authority.

Defendants’ first argument is that the Court of Appeals decision in *Snakenberg v. Hartford Cas. Ins. Co.*, 299 S.C. 164, 171, 383 S.E.2d 2, 6 (Ct. App. 1989) is the controlling authority on the question of whether actual viewing is required for the tort of intrusion into private affairs. As Plaintiffs show the Court in their motion, *O’Shea v. Lesser*, 308 S.C. 10, 17–18, 416 S.E.2d 629, 633 (1992) is actually the controlling case, and established under South Carolina law that “actual viewing” is not necessary to satisfy the “intrusion” element of the intrusion into private affairs tort.

In their opposition, Defendants have no answer for the plain language of the *O'Shea* case: if a person “can see” into a neighbor’s window, that satisfies the intrusion element of the tort where the plaintiff shows “a blatant and shocking disregard of his rights, and serious mental or physical injury or humiliation to himself resulting therefrom.” *O'Shea*, 308 S.C. at 17-18, 416 S.E.2d at 633. There is no “implicit recognition” by the *O'Shea* court that “information must be obtained about the plaintiff when the explicit language of *O'Shea* says “can see.” Defendants’ unsupported assertion that “[i]t’s not so much whether there was a situation in which a person could have been viewed” (ECF 90 at 8) doesn’t qualify as any kind of reasoned analysis that would negate the plain language (“can see”) of *O'Shea*.

Defendants also inexplicably highlight the phrase “bringing forth no evidence of public disclosure,” as if this somehow creates a requirement of actual viewing. ECF 90 at 8, n.4. Again, the Plaintiffs’ claims here do not involve the public disclosure invasion of privacy sub-tort. Plaintiffs also don’t allege public disclosure in connection with the intrusion into private affairs tort. However, the very language quoted by Defendants demonstrates that isn’t fatal to the intrusion into private affairs claim. The proper way to read the *O'Shea* language quoted in Footnote 4 is a plaintiff basing an action for invasion of privacy “on intrusion” must show “a blatant and shocking disregard of his rights, and serious mental or physical injury or humiliation to himself resulting therefrom,” when there is no evidence of public disclosure brought forth. That language doesn’t stand for the proposition that actual viewing is required in any way.

The ascertainability, standing, and predominance analysis all hinge upon the question of whether actual viewing is required for the intrusion into private affairs tort. Defendants fail to make a compelling showing that the Court did not commit a manifest error of law in overlooking

the significance of the plain language of *O'Shea. Snakenberg* is not the controlling authority, and neither is the law review note relied upon by the Court.

2. Plaintiffs Demonstrated That There are No Additional Predominance or Superiority Issues.

Contrary to what Defendants argue, there are no remaining predominance or superiority issues that would serve to defeat class certification. Defendants argue that “individual proof and damages will predominate over common issues of the litigation.” However, the “individual proof” that the Court referenced relates to the actual viewing, which isn’t a requirement under South Carolina law.

As for damages, in addition to the arguments advanced by Plaintiffs in their motion (at pages 15-17), *Snakenberg* states the following:

if the plaintiff proves the four elements needed to establish his cause of action, the fact of damage is established as a matter of law. The amount of damage is then to be assessed by the trier of fact. In assessing the damage, the trier of fact may consider the shame, humiliation, and emotional distress suffered by the plaintiff as compensable elements of damage.

Snakenberg, 299 S.C. at 172, 383 S.E.2d at 6. Establishing “damages as a matter of law” can be fairly read as the Court of Appeals recognizing the availability of nominal damages for the intrusion into private affairs tort. Nominal damages are not subject to individualized proof and thus would not defeat predominance. And, pertinent to the standing questions this Court faces here, *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 209 L. Ed. 2d 94 (2021), holds that nominal damages are sufficient to imbue one with Article III standing.

With regard to superiority, Defendants simply ignore the persuasive arguments made in Plaintiffs’ motion. Class adjudication is superior because no one would be able to bring these claims by himself or herself, as damages are too small (if nominal damages are all that are available). See *Livingston v. Sims*, 197 S.C. 458, 15 S.E.2d 770, 772 (1941).

For these reasons, and those set out more fully in Plaintiffs' motion, the Court should reconsider its ruling on class certification, and certify the proposed classes here.

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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

Gary Nestler, <i>et al.</i> ,)	Civil Action No. 2:21-cv-613-RMG
)	
Plaintiffs,)	
)	
v.)	
)	
The Bishop of Charleston, a Corporation)	ORDER
Sole, <i>et al.</i> ,)	
)	
Defendants.)	
)	

Before the Court is Plaintiffs’ motion for reconsideration and Plaintiffs’ motion to certify question to the Supreme Court of South Carolina. For the reasons set forth below, the Court denies Plaintiffs’ motions.

I. Background

On March 24, 2022, the Court denied Plaintiffs’ motion for class certification. (Dkt. No. 84) (the “Prior Order”).

On April 21, 2022, Plaintiffs moved for reconsideration of the Prior Order. (Dkt. Nos. 88, 93). Plaintiffs also moved for the Court to certify a question to the South Carolina Supreme Court. (Dkt. Nos. 89, 92). Defendants oppose both motions. (Dkt. Nos. 90, 91).

II. Legal Standard

Federal Rule of Civil Procedure 59(e) permits a district court to alter, amend, or vacate a prior judgment. Rule 59(e) permits a court to amend a judgment in three situations: “(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial [or summary judgment]; or (3) to correct a clear error of law or prevent manifest injustice.” *Zinkand v. Brown*, 478 F.3d 634, 637 (4th Cir.2007) (citations omitted). Courts are

reluctant to grant such a motion, because “reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly.” *Pac. Ins. Co. v. Am. Nat’l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir.1998) (quoting 11 Charles Alan Wright, et al., *Federal Practice and Procedure* § 2801.1, at 124 (2d ed.1995)). Although “there are ‘circumstances when a motion to reconsider may perform a valuable function,’ ... it [is] improper to use such a motion to ‘ask the Court to rethink what the Court ha[s] already thought through—rightly or wrongly.’” *Potter v. Potter*, 199 F.R.D. 550, 552 (D. Md.2001) (quoting *Above the Belt, Inc. v. Bohannon Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D.Va.1983)).

III. Discussion

In its Prior Order, the Court denied Plaintiffs’ motion for class certification on the basis that the proposed classes were fail-safe classes and not ascertainable, that the named Plaintiffs lacked standing, and that neither predominance nor superiority were met. Central to these findings was the Court’s holding that the tort of wrongful intrusion into private affairs required actual viewing. *Snakenberg v. Hartford Cas.*, 299 S.C. 164, 171-72 (Ct. App. 1989) (The cause of action for wrongful intrusion into private affairs consists of (1) an intentional (2) intrusion, (3) which is substantial and unreasonable, (4) into that which is private.); *Id.* at 172 (Damages “consist[] of the unwanted *exposure* resulting from intrusion.”) (emphasis added); Prior Order, (Dkt. No. 84 at 9) (holding that “South Carolina law explicitly requires that information about the victim be acquired by the defendant for the tort to be actionable”); *O’Shea v. Lesser*, 308 S.C. 10, 17-18 (1992) (Where “a plaintiff bases an action for invasion of privacy on ‘intrusion,’ bringing forth no evidence of public disclosure, it is incumbent upon him to show a blatant and shocking disregard of his rights, and serious mental or physical injury or humiliation to himself resulting therefrom.”) (citing *Rycroft v. Gaddy*, 281 S.C. 119 (Ct. App. 1984)). Plaintiff argues this holding was a clear error of law. (Dkt. No. 88 at 2, 5-7). Plaintiff states that *O’Shea* stands for the proposition that

“actual viewing” is not necessary to satisfy the elements of the tort for wrongful intrusion into private affairs.

In *O’Shea*, respondents obtained permission to make certain improvements to their home. Appellant argued those improvements provided respondents with a view into her home, thereby forcing her to change her lifestyle. Appellant brought claims for breach of contract, fraud, breach of contract accompanied by a fraudulent act, and negligence. *Id.* 14. The master-in-equity, after dismissing all claims but breach of contract, found for respondents. On appeal, appellant challenged, inter alia, the master-in-equity’s finding that she sustained no damages even though she asserted that her neighbors’ ability to see into her home constituted an invasion of privacy. *Id.* at 17.

The court affirmed the master-in-equity’s finding regarding damages. The court reiterated *Rycroft*’s holding that, in the absence of *public disclosure*, the tort of intrusion requires plaintiff to show a “blatant and shocking disregard of his rights, and serious mental or physical injury or humiliation to himself resulting therefrom.” *Id.* at 17-18 (noting “the fact that the Lessers can see into a portion of appellant’s home is not so blatant or shocking as to constitute an invasion of privacy”) (citing *Rycroft*, 281 S.C. 119 (Ct. App. 1984)).

The Court denies Plaintiff’s motion for reconsideration. As shown above, *O’Shea* did not modify the elements of the tort of intrusion. To the contrary, *O’Shea* reaffirmed those elements by citing *Rycroft* with approval, bolstering this Court’s finding that the tort of intrusion requires proof of actual viewing. *O’Shea*, 308 S.C. at 17-18 (acknowledging information must be obtained about the plaintiff because, where “a plaintiff bases an action for invasion of privacy on ‘intrusion,’ bringing forth no evidence of public disclosure [of the information], it is incumbent upon him to show a blatant and shocking disregard of his rights, and serious mental or physical injury or

humiliation to himself resulting therefrom”) (*citing Rycroft*, 281 S.C. at 124-25). Plaintiffs’ argument that *O’Shea* somehow modified the tort of intrusion, (Dkt. No. 88 at 6-7) (arguing that the use of the phrases “can see” and “ability to see” imply “it is possible to satisfy the intrusion element with the mere ability to see [], not actual viewing”) (emphasis removed), is contrary to the plain language of that decision.

Accordingly, the Court denies Plaintiffs’ motion for reconsideration. Further, given this finding, the Court declines to certify a question to the South Carolina Supreme Court regarding the elements of the tort of intrusion.

IV. Conclusion

For the reasons stated above, Plaintiffs’ motion for reconsideration (Dkt. No. 88) and Plaintiff’s motion to certify question (Dkt. No. 89) are **DENIED**.

AND IT IS SO ORDERED.

s/ Richard M. Gergel
Richard M. Gergel
United States District Judge

May 24, 2022
Charleston, South Carolina

**United States District Court
District of South Carolina
Charleston Division**

Gary Nestler,
Viewed Student Female 200,
Viewed Student Male 300,
on behalf of themselves and all others
similarly situated,

Plaintiffs,

vs.

The Bishop of Charleston, a Corporation
Sole, Bishop England High School,
Tortfeasors 1-10, The Bishop of the Diocese
of Charleston, in his official capacity, and
Robert Guglielmone, individually,

Defendants.

C/A: 2-21-cv-00613-RMG

**PLAINTIFFS' RESPONSE
AND MEMORANDUM
IN OPPOSITION TO
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

Come now Plaintiffs, by and through their undersigned counsel, and file this Response in Opposition to Defendants' Motion for Summary Judgment (ECF #85), and memorandum in support of such opposition.

In the shortest statement possible, Defendants have moved based on this Court's Order denying class certification (ECF #84) and declining to certify a question as to South Carolina law to the South Carolina Supreme Court (ECF #95). In issuing such Order this Honorable Court placed much reliance on *Snakenberg v. Hartford Cas. Ins. Co.*, 299 S.C. 164, 171, 383 S.E.2d 2, 6 (Ct. App. 1989) and *O'Shea v. Lesser*, 308 S.C. 10, 17-18, 416 S.E.2d 629, 633 (1992). We

believe that the Court erroneously construed those opinions, and perhaps others, and has now been asked to grant relief in terms of across-the-board summary judgment grant to Defendants based squarely on such flawed reasoning as articulated in its earlier determinations referenced above. See ECF#84 and ECF#95.

The posture of the case does not support a grant of summary judgment to the Defendants. One reason for this is that the Plaintiffs, the injured parties, clearly enjoy standing and are properly before this Court. In addition, the true posture of the underlying matter is that it has only been partially developed because Plaintiffs have been restricted in the amount of discovery and the discoverable issues the Court allowed. Only ten depositions have been allowed and the limitation imposed by this Court was to issues of class certification only, even though Defendants seem to now wish to spill over into what they perceive as deficiencies in proof overall as to the merits of the various causes of action, which Plaintiffs, again, have not been allowed to examine into by discovery tools. For this Court to grant such relief would be a manifest injustice.

The standards to be applied to a motion for summary judgment, granting the opposing parties, the Plaintiffs, the benefit of all reasonable inferences and conclusions which could be drawn, mandate Plaintiffs sought relief.

Although a large number of Plaintiffs have been overreached and had their rights invaded, thousands of whom were victimized as minors; and the adult tuition paying Plaintiffs had hidden from them the existence of the four foot by four foot viewing windows which the high school had installed and utilized, and this is not contested, for a period of twenty-one years, for the purpose of viewing, monitoring, students while they were in various stages of nudity and conducting highly personal and private matters, as would be expected in a locker/dressing room. We urge the Court most sincerely to critically review the status of the record, even so scantily yet developed as was

possible under the restrictions imposed limiting discovery only to issues of class certification. The Court's burden is recognized as lessened when one considers that the Defendants themselves have acknowledged certain critical aspects of Plaintiffs' claims. We have said to the Court previously and do so again herein, and we earnestly urge that the Court take the time to reflect through a few salient points. The fact is that the Defendants themselves have acknowledged a number of things, including:

A. That the viewing windows were for the purpose of monitoring, viewing Bishop England High School students during their use of locker rooms/dressing room facilities. *See Exhibit 1* – Press Release from the Diocese of Charleston 2.4.21.

B. That the foregoing viewing was accomplished at least by faculty, staff, and employees of Defendants. *See Exhibit 2* – Finneran Depo 10.5.21 P. 60, L. 24-P. 61, L. 2.

C. The Defendants themselves estimate that as many as 7,500 student locker/dressing room users may have been viewed over the period of existence of the windows. *See Exhibit 3* – BEHS's Answers to Plaintiffs' First Set of Interrogatories, specifically number 20. *See also Exhibit 4* – Photograph of Athletic Director/Coach Runey's office desk arrangement and the window looking directly into a locker room.

D. Numerous students were actually video recorded while at BEHS by way of the viewing windows. *See Exhibit 5* - Transcript of Record, State of South Carolina v. Jeffrey Alan Scofield, Case No. 2019-GS-08-01294 (General Sessions Court, Berkeley County, South Carolina June 9, 2020) at pages 8-9. These recordations were left by the viewer on a BEHS iPad and were ultimately discovered by BEHS students who were using the device in relation to an athletic competition viewing. Interestingly, the students happened upon other disgusting nude images which had been left on the electronic device. Certainly this is evidence as to degree of impact on

students who were required to disrobe, etc. while viewable through the viewing windows. The images were left on a BEHS iPad viewable by whomsoever was a subsequent user of the device. Another way of saying the same thing is that such invasive images were indiscriminately left for viewing, copying, or display without limitation, and it happened. That is significantly impactful to all victims, nobody could possibly disagree with or justify this a contrary conclusion; a jury won't and Plaintiffs are absolutely entitled to the reasonable inferences which could be drawn from these facts.

E. All of this unbelievably intrusive, demeaning and demented viewing was of students in a gymnasium locker rooms/dressing rooms over a period of twenty-one years. All students were mandated to take physical education as part of the core curriculum at Bishop England High School, so they could count on being in front of these windows. And all of the activity was criminal including the conspiracy to enter into the window viewing of private, personal, nude acts by the students, and the nondisclosure of such acts, the coverup, for twenty-one years, and the intentional destruction of evidence, in the possession of the Defendants, who had been specifically instructed to preserve the same. *See Exhibit 6 - Spoliation notice and Exhibit 7 - Finneran Depo 10.5.21 P. 15, L. 10-P. 17, L. 13; P. 96, L. 17-P.105, L. 22.*

F. Plaintiffs' expert Dr. Amanda Salas is a board-certified psychiatrist who personally interviewed and evaluated Class Representatives Viewed Female Student 200 and Viewed Male Student 300. She has offered her medical opinion that the Class Representatives suffered a negative psychological impact upon learning that they could have been viewed while undressing. In addition, the viewing of highly personal and private activities of the student users was inescapably offensive and all who learned that they had been exposed to the possibility of such viewing would be impacted. Dr. Salas' fuller stated opinion is reprinted here, below:

Proffered Professional Opinions

The transparent viewing windows into the dressing rooms at Bishop England are a breach of privacy that was not known, recognized, appreciated, or expected by the interviewed users of these facilities. Undressing can be uncomfortable and may be associated with embarrassment. Shame, fear, and nervousness are feelings that one may experience with the process of undressing. The perception of privacy invasion surrounding an undressing experience can bring up these feelings.

Each of the interviewed class representatives articulated an expectation of privacy and respect for their personal space within the Bishop England changing rooms. Upon learning of the natures and risks associated with the viewing window, the interviewed class representatives experienced a negative shift in their emotional state. Both described concerns related to the possibility of having been viewed, photographed, videoed, or made an unknown victim to one's voyeuristic sexual pleasures. Both expressed concern of not knowing, and not being able to know within a degree of certainty, the extent of personal violation to which they were subjected when utilizing the dressing rooms at Bishop England High School. Although neither were aware of having been photographed or recorded from the viewing windows, each expressed thoughts of worry as to whether they may face future embarrassment or humiliation from what could have been photographed or recorded during their use of the changing facilities at Bishop England High School.

Every student who was subjected to undressing before the viewing windows is expected to be impacted. Those persons can have a range of emotions and psychological impacts by having been exposed to the viewing windows, whether exposed by perception or reality. The degree by which an individual is affected hinges on factors unique to each. Impact by the invasion of privacy to which students were subjected while in the dressing rooms at Bishop England High School is clearly directed to the negative.

The opinions included in this report are my professional medical opinions offered to a reasonable degree of medical certainty based on the available information. I reserve the right to supplement this opinion should additional information come forth.

Dr. Salas Report (Dkt. #41-1).

G. The Defendants' acts didn't happen one day. They happened every school day for

twenty-one years! That conduct is reprehensible and significant and demented, *ab initio*, and the idea that no oversight by Bishop England High School or other Diocesan officials in the form of mandated methods or controls of viewing, mandated documentation of time, place and specific viewers, none of which was required by any of the Defendants, shows just what can and will very easily lead a jury to conclude that these are activities of renegades, not well reasoned adults, and the jury may with these facts and others that it will see during a merits presentation conclude that the facts go together to prove the elements of the causes of action upon which Plaintiffs have sued and may award substantial damages to Plaintiffs even including, at least as to the tort claims, an award of punitive damages, this because the activity is so egregious that a jury may very well want to speak loudly to cause such activity to stop and never be engaged in again.

The foregoing is not even to mention the egregious nature of secreting this activity from the tuition paying parents, guardians, etc. for the referenced twenty-one year period. *See Exhibit 8* – Diocese Defendants’ Responses to Plaintiffs’ First Requests for Production, specifically numbers 6 and 7, where Plaintiffs asked Defendants to produce any writings notifying the tuition payers of this practice; and, of course, Defendants objected and never produced any such writings.

Defendants argue that the Court of Appeals decision in *Snakenberg v. Hartford Cas. Ins. Co.*, 299 S.C. 164, 171, 383 S.E.2d 2, 6 (Ct. App. 1989) is the controlling authority on the question of whether actual viewing is required for the tort of intrusion into private affairs. As Plaintiffs have previously shown this Court, and now do so again, *O’Shea v. Lesser*, 308 S.C. 10, 17–18, 416 S.E.2d 629, 633 (1992) is actually the controlling authority, and established under South Carolina law that “actual viewing” is not necessary to satisfy the “intrusion” element of the intrusion into private affairs tort.

In their opposition, Defendants have no answer for the plain language of the *O'Shea* case: if a person “can see” into a neighbor’s window, that satisfies the intrusion element of the tort where the plaintiff shows “a blatant and shocking disregard of his rights, and serious mental or physical injury or humiliation to himself resulting therefrom.” *O'Shea*, 308 S.C. at 17-18, 416 S.E.2d at 633. There is no “implicit recognition” by the *O'Shea* court that “information must be obtained about the plaintiff when the explicit language of *O'Shea* says “can see.” Defendants’ unsupported assertion that “[i]t’s not so much whether there was a situation in which a person could have been viewed” (ECF 90 at 8), doesn’t qualify as any kind of reasoned analysis that would negate the plain language (“can see”) of *O'Shea*. By the very nature of the activities Defendants engaged in, its duration, its unbridled execution, its coverup and nondisclosure, the Defendants have put themselves outside the law, they have engaged in criminal activities and have given the populace in general sound reasons to condemn the acts and the actors. And the thousands who did not agree to pose partially or fully nude before salivating viewers were all impacted significantly for their entire lifetimes. No objective mind, and no jury collectively possessed of such minds, could ever condone Defendants’ intrusion into the victims’ private affairs; and no jury can possibly undermine the degree of impact on the victims. Dr. Salas has given a medical opinion that, “Every student who was subjected to undressing before the viewing windows is expected to be impacted.” *See* Dr. Salas Report (Dkt. #41-1). Dr. Salas also testified at her deposition that every alumnus of BEHS will be impacted, but that they all will be affected differently. *See Exhibit 9*, Dep. A. Salas, P. 67, L. 24 – P. P. 68, L. 10. It is criminal activity, and it cannot be justified.

Defendants also inexplicably highlight the phrase “bringing forth no evidence of public disclosure,” as if this somehow creates a requirement of actual viewing. ECF 90 at 8, n.4. Again, the Plaintiffs’ claims here do not involve the public disclosure invasion of privacy sub-tort.

Plaintiffs also don't allege public disclosure in connection with the intrusion into private affairs tort. However, the very language quoted by Defendants demonstrates that isn't fatal to the intrusion into private affairs claim - but please recall that images were left on the BEHS device used by the person capturing the images, and other people came upon them – fellow students who, thank God, were honorable. Who can possibly argue in good faith that a shocking and blatant disregard of plaintiffs', the victims, rights has not occurred, or that “serious mental or physical injury or humiliation” results therefrom? The proper way to read the *O'Shea* language quoted in Footnote 4 is a plaintiff basing an action for invasion of privacy “on intrusion” must show “a blatant and shocking disregard of his rights, and serious mental or physical injury or humiliation to himself resulting therefrom.” Such language doesn't stand for the proposition that actual viewing is required in any way.

As for damages, in addition to the arguments advanced by Plaintiffs in their motion for reconsideration (ECF #88 at pages 15-17), *Snakenberg* states the following:

if the plaintiff proves the four elements needed to establish his cause of action, the fact of damage is established as a matter of law. The amount of damage is then to be assessed by the trier of fact. In assessing the damage, the trier of fact may consider the shame, humiliation, and emotional distress suffered by the plaintiff as compensable elements of damage.

Snakenberg, 299 S.C. at 172, 383 S.E.2d at 6. Establishing “damages as a matter of law” can be fairly read as the Court of Appeals recognizing the availability of nominal damages for the intrusion into private affairs tort. Nominal damages are not subject to individualized proof and thus would not defeat predominance. And, pertinent to the standing questions this Court faces here, *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 209 L. Ed. 2d 94 (2021), holds that nominal damages are sufficient to imbue one with Article III standing.

CONCLUSION

This is no case for summary judgment. In addition, our South Carolina Supreme Court exists in part for the purpose of answering questions certified to it. If this Honorable Court still has any uncertainty about South Carolina law, then it is error not to seek from, and allow that authority to declare the South Carolina law. Such rises even to the level of an error of law and an abuse of discretion by this Honorable Court.

We respectfully and humbly beseech this Court not to leave these Plaintiffs with no remedy and we urge the Court to please reconsider the controlling authorities we have mentioned herein. They are compelling.

Respectfully submitted,

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Attorneys for Plaintiffs

June 6, 2022

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EXHIBIT 1

JA1584



ROMAN CATHOLIC
DIOCESE
OF CHARLESTON
OFFICE OF MEDIA RELATIONS

PRESS RELEASE

FOR IMMEDIATE RELEASE

Feb. 4, 2021

Contact: Maria Aselage, Director of Media Relations

(843) 513-7605 ~ maria@charlestondiocese.org

Statement from the Roman Catholic Diocese of Charleston regarding the proposed class action lawsuit related to Bishop England High School

CHARLESTON, SC – The Roman Catholic Diocese of Charleston released the below statement related to the lawsuit filed today involving Bishop England High School. The statement should be attributed to Maria Aselage, spokesperson for the Roman Catholic Diocese of Charleston.

The Catholic Diocese of Charleston received the lawsuit involving Bishop England High School this morning. After reviewing it, we feel that the class action claims have absolutely no merit.

The windows between the athletic coaches' offices and the boys' and girls' locker rooms were included in the plans and installed in the building in the 1990's for safety reasons. Their purpose was to allow coaches to monitor for fights, bullying, smoking or any type of inappropriate activity that might occur within the locker rooms. The plaintiff's claim that the windows were installed for the sole purpose of exploiting students is simply ludicrous.

When school officials learned about a member of its athletic staff videotaping boys in the locker room in May 2019, they immediately contacted police and terminated the employee. Soon afterward, the windows were covered and were subsequently removed and replaced with a block wall.

Contrary to the claims in the lawsuit, the Catholic Diocese of Charleston takes protection of children very seriously. It mandates that every teacher, other employee, and volunteer who has regular access to children undergo a background screening, attend a child abuse prevention education program, and sign a code of conduct governing their interactions with minors. Additionally, Catholic school teachers and staff are required to attend boundary training.

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EXHIBIT 2

Deposition of Patrick Finneran

1

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF SOUTH CAROLINA
3 CHARLESTON DIVISION

4 DEPOSITION OF PATRICK FINNERAN

5 OCTOBER 5, 2021

6 GARY NESTLER, VIEWED STUDENT FEMALE 200, VIEWED
7 STUDENT MALE 300, on behalf of themselves and all
8 others similarly situated,

9 Plaintiffs,

10 vs.

11 CASE NO. 2:21-cv-0613-RMG

12 THE BISHOP OF CHARLESTON, A CORPORATION SOLE;
13 BISHOP ENGLAND HIGH SCHOOL; TORTFEASORS 1-10; THE
14 BISHOP OF THE DIOCESE OF CHARLESTON, in his
15 official capacity; and ROBERT GUGLIELMONE,
16 Individually,

17 Defendants.
18
19

20 TIME: 9:10 AM

21 LOCATION: THE RICHTER LAW FIRM
22 MOUNT PLEASANT, SOUTH CAROLINA

23 REPORTED BY: RONDA K. BLANTON, RPR
24 CLARK & ASSOCIATES, INC.
25 CHARLESTON, SC 29422
843-762-6294
WWW.CLARK-ASSOCIATES.COM

1 with the school would have access --

2 Q. In sports. Sorry. Maybe I misspoke. I
3 meant people who were involved in the athletic
4 programs who were students who were playing a
5 sport of some sort, they would be the ones who
6 would regularly use the locker rooms.

7 A. Yes.

8 Q. And in addition to those people, it
9 would be anybody who was involved in physical ed?

10 A. Yes.

11 Q. And physical ed would be students who --
12 who were -- would be all students who are
13 required to have a physical ed degree or physical
14 ed class before they graduated Bishop England?

15 A. Yes, sir.

16 Q. So if I was to transfer to Bishop
17 England in my junior year and if I had not had a
18 PE class, would I be required to take PE in my
19 junior year?

20 A. Yes.

21 Q. Same for --

22 A. Junior or senior year.

23 Q. Junior or senior year. Okay.

24 Were teachers instructed per -- what I
25 believe the handbook suggests, that part of their

Deposition of Patrick Finneran

61

1 job was to monitor the locker rooms?

2 A. The -- the PE teachers, yes.

3 Q. And was there a log kept as to when they
4 would do it or how often they would do it or the
5 hours they would do it?

6 A. No, sir.

7 Q. Do you know if they did it?

8 A. If they did it?

9 Q. Yes, sir.

10 A. No. I'm not --

11 Q. Was that something that was in place
12 from the time that you came to the school all the
13 way through present?

14 A. Yes.

15 Q. And was it successful?

16 A. I mean --

17 MR. DUKES: Object to the form.

18 Q. You've got three incidents in the time
19 that you've been at the school for eight years;
20 correct?

21 A. Yes.

22 Q. One of them was shoplifting of a wallet,
23 and two of them were videos taken; correct?

24 A. Yes.

25 Q. That's all the incidents you have?

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EXHIBIT 3

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

C/A No.: 2:21-cv-00613-RMG

Tuition Payer 100, Viewed Student Female
200, Viewed Student Male 300, on behalf of
themselves and all others similarly situated,

Plaintiffs,

vs.

The Bishop of Charleston, a Corporation Sole,
Bishop England High School, Tortfeasors 1-
10, The Bishop of the Diocese of Charleston,
in his official capacity, and Robert
Guglielmone, individually,

Defendants.

**DEFENDANT BISHOP ENGLAND HIGH
SCHOOL'S ANSWERS TO PLAINTIFFS'
FIRST INTERROGATORIES**

By way of general objection to Plaintiff's discovery requests, Bishop England High School is an operation and ministry of Bishop of Charleston, a Corporation Sole, and has no separate existence from the Corporation Sole. Subject to and without waiving the stated objections, Defendant answers Plaintiffs' First Interrogatories as follows:

ANSWERS TO PLAINTIFFS' FIRST INTERROGATORIES

1. Whose idea was it to install the windows between the coach's or athletic department offices and the various locker rooms/dressing rooms at Bishop England High School (BEHS), and any other window capable of being used to view less than fully clothed persons when the school was constructed on Daniel Island?

ANSWER:

The Diocese relied on the expertise of architects, builders, and others for the design and construction of the building and the installation of certain measures to ensure the safety

of students. The architects were LS3P; the primary contractor was Gulf Stream Construction.

2. Are there, or have there ever been, security cameras located in any of the BEHS bathrooms, changing rooms, or locker rooms since 1998? If yes, please state when the cameras were installed, who had/has custody over the films, whose responsibility it was/is to monitor the films, who was/is responsible for maintenance of the cameras.

ANSWER:

No.

3. Are there, or have there ever been, security cameras located in any interior room or hallway at BEHS that is not in the bathrooms, changing rooms, or locker rooms since 1998? If yes, please state when the cameras were installed, who had/has custody over the films, whose responsibility it was/is to monitor the films, and who was/is responsible for maintenance of the cameras.

ANSWER:

The school has 47 cameras located in common areas of the school, outside, hallways, and gymnasium. Installation of the cameras happened over time, from 2014 to 2020. The video from the cameras remains on the DVR for seven days, and it is accessible to the school's administration and IT staff. The live video from the cameras is available to administrative staff. Some camera feeds are shown in the main office for security reasons related to allowing visitors entrance to the school campus. The school's Director of Operations and Maintenance Director are responsible for the maintenance and upkeep of the cameras and DVRs as well as for the ordering of new cameras when deemed necessary.

4. Please state what surveillance BEHS does of its students that does not occur in the bathrooms, changing rooms, or locker rooms for security and safety of its students.

ANSWER:

This Defendant objects to Interrogatory No. 4 as not related to any claim or defense involved in the case; not related in any way to issues of class certification; and disproportionate to the needs of the case. In addition, Interrogatory 4 seeks production of information that is totally irrelevant to the case. Subject to the stated objection, students and visitors are monitored by teachers and staff during school hours and during school-sponsored activities such as sports or clubs. Additionally, all classroom doors have windows so that an observer can see what is happening inside.

5. As to the viewing windows at issue in this case, whose decision was it to cover over or alter the windows in any way?

ANSWER:

BEHS administrators in consultation with the Superintendent of Education for the Diocese and other Diocesan officials.

6. How many students using the subject BEHS locker/dressing rooms were recorded either by video, motion picture or still photographs?

ANSWER:

Defendant is aware of 5 boys who were photographed while changing clothes in the locker room. Two were initially identified by the Charleston Police Department in May, 2019. The Attorney General's Office found additional photographs or videos with another 3 boys pictured.

7. Did you disclose to parents and/or students how many victims were viewed and recorded while using the subject locker/dressing rooms? If so, how many victims did you disclose were viewed and recorded?

ANSWER:

The parents of the boys who were photographed were notified. All parents / guardians were notified that 5 boys had been photographed.

8. Please state all disciplinary infractions that have occurred in any of the dressing rooms and/or locker rooms from 1998 to date, stating the type of infraction, how it was discovered, whom the infraction was reported to, and the disposition of the infraction.

ANSWER:

The Diocese is attempting to compile the information requested and will supplement if any information or documents are found.

9. Please state all disciplinary infractions that have occurred in any of the bathroom facilities from 1998 to date, stating the type of infraction, how it was discovered, whom the infraction was reported to, and the disposition of the infraction.

ANSWER:

The Diocese is attempting to compile the information requested and will supplement if any information or documents are found.

10. For Interrogatories #8 and #9, were these incidents reported to the appropriate BEHS authority, Diocesan authority, or police/law enforcement/or government agency?

ANSWER:

The Diocese is attempting to compile the information requested and will supplement if any information or documents are found.

11. Whose responsibility was it to monitor activity through the windows at BEHS from 1998 to the present? Has this position remained the same since 1998?

ANSWER:

The windows into the boys' locker room were in the Athletic Director's office and the boys' basketball office. Jack Cantey occupied the AD's office for the first year and Paul Runey has occupied the office since. Paul Runey was in the boys' basketball office for the first year with Bill Runey, and it was occupied by the boys' basketball coach after the first year. The window in the girls' locker room is in the girls' PE teacher's office. Amelia Dawley, DeLane Neuroth, and Janel Swanson have been the girls' PE teachers since we moved to the Daniel Island campus.

There was no active monitoring responsibility for the adults in the offices, but they would intercede if there was an issue like bullying, fighting, or other discipline issues.

12. How were the persons who were to have access to viewing through the subject windows trained?

ANSWER:

All employees of BEHS are required to undergo background checks and to go through Safe Environment Training. In addition, the school conducts in service programs from time to time to emphasize safety of students.

13. What records are kept memorializing periods of viewing activity through the subject windows?

ANSWER:

Student discipline records are kept for one year after graduation date and then destroyed. There are no records of when the windows were monitored.

14. Please describe, including by name, date, location, and total earnings, every gambling event or activity engaged in by or for the benefit of BEHS or any of its affiliated entities for the time period of 1998 to date.

ANSWER:

This Defendant objects to Interrogatory No. 14 as not related to any claim or defense involved in the case; not related in any way to issues of class certification; and disproportionate to the needs of the case. In addition, Interrogatory 14 seeks production of information that is totally irrelevant to the case. Subject to the stated objection, games of chance have been prohibited as fundraisers for decades.

15. To the extent respondent hereto claims that acts described in response to the preceding interrogatory were not illegal acts, please state with specificity the reason or reasons for such claim or claims.

ANSWER:

Not applicable.

16. State the total amount of tuition that was paid per year to BEHS for the time period beginning with the 1998-1999 school year through the 2018-2019 school year.

ANSWER:

The Diocese is attempting to compile that information and will supplement.

17. State with specificity what changes or modifications, if any, have been made to the windows that are the subject of this litigation, at BEHS during the years 1998 through 2021.

ANSWER:

The windows were covered with plywood initially. As announced to parents, the windows have since been bricked.

18. State who made the decisions to alter the windows referenced above.

ANSWER:

The school's administration in consultation with the Catholic Schools' Office and other offices in the Diocese of Charleston made the decision to alter the windows.

19. Who performed the modification work, if any, as to the subject windows and give the specific dates and costs of any such work, alteration, or modification of the subject windows?

ANSWER:

Maner Construction removed and blocked in the window openings in July 2020 as a service to the school.

20. Please name each person who was enrolled at BEHS during the years 1998 through 2019 and for each please state the address at the time during which he/she was a student there, the last known address, email address, and telephone number (cell phone and land line).

ANSWER:

This Defendant objects to Interrogatory No. 9 as not related in any way to issues of class certification; and disproportionate to the needs of the case. This Defendant is aware of several thousand, perhaps as many as 7,500, who have attended the school at some time between 1998 and 2021.

21. Identify each BEHS tuition payor (person or entity) from 1998 through 2019, and for each tuition payor provide the name, address, email address, phone number, amount of tuition paid, and whose tuition was paid for.

ANSWER:

This Defendant objects to Interrogatory No. 21 as not related in any way to issues of class certification; and disproportionate to the needs of the case. This Defendant is aware of several thousand, perhaps as many as 7,500, who have attended the school at some time between 1998 and 2021 and some or all would have had at least one parent or guardian who paid their tuition.

22. Please provide the names, addresses, phone numbers, and email addresses of all persons serving on any governing or advisory board and/or any building committee of BEHS during any portion of the years 1995-2021.

ANSWER:

The Diocese is compiling the information to respond to Interrogatory No. 22 and will supplement.

23. Please state the names and class years of each student who was not required to take the course known commonly as Physical Education during the period 1998 through 2019.

ANSWER:

This Defendant objects to Interrogatory No. 23 as not related in any way to issues of class certification; and disproportionate to the needs of the case. Furthermore, this Defendant points out that conducting the inquiry called for by Plaintiffs would entail precisely the sort of individual examination that will defeat class certification.

24. Please state the names of all BEHS students who you claim were not viewed by any school personnel or other person through the viewing windows, or any of them, during the period 1998 through 2019, while such students were partially or fully nude.

ANSWER:

This Defendant objects to Interrogatory No. 24 as not related in any way to issues of class certification; and disproportionate to the needs of the case. Furthermore, this Defendant points out that conducting the inquiry called for by Plaintiffs would entail precisely the sort of individual examination that will defeat class certification.

25. Please state the source and amount of any revenue received by BEHS during the years 1998 to date.

ANSWER:

This Defendant objects to Interrogatory No. 25 as not related in any way to issues of class certification; and disproportionate to the needs of the case.

TURNER, PADGET, GRAHAM & LANEY, P.A.

July 12, 2021

By: s/Richard S. Dukes, Jr.

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ATTORNEYS FOR DIOCESE DEFENDANTS

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EXHIBIT 4

JA1601



JA1602

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EXHIBIT 5

1 STATE OF SOUTH CAROLINA) GENERAL SESSIONS COURT
2 COUNTY OF BERKELEY) CASE NO. 2019-GS-08-01294
3 STATE OF SOUTH)
4 CAROLINA,) Transcript of Record
5 Plaintiff,)
6 vs.)
7 JEFFREY ALAN SCOFIELD,) Date: June 9, 2020
8 Defendant.)

9 * * * * *

10 B E F O R E:

11 The Honorable Roger M. Young
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20 * * * * *

21
22 Denise J. Lauder, RPR
23 Ninth Judicial Circuit
24
25

1 A P P E A R A N C E S

2

3 REPRESENTING THE PLAINTIFF:

4 DAVID COLLIER, ASSISTANT ATTORNEY GENERAL

5 Attorney General's Office

6 1801 Main Street

7 Columbia, SC 29201-2409

8

9 REPRESENTING THE DEFENDANT:

10 DEBRA LITTLEFIELD, PUBLIC DEFENDER

11 Berkeley County Public Defender's Office

12 219 North Highway 52

13 Suite E

14 Moncks Corner, SC 29461

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9 INDEX OF EXHIBITS

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11 (No exhibits were offered or
12 marked for identification.)

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1 (The following proceedings were had
2 June 9, 2020, via the Virtual Courtroom, Berkeley
3 County General Sessions Court, Judge Young, State
4 v. Scofield, 2:28 p.m.)

5 THE COURT: Mr. Scofield. Where is
6 Mr. Scofield?

7 MS. LITTLEJOHN: He's in BCPD.

8 THE COURT: All right. Is that him
9 with the Berkeley PD Probook?

10 MS. LITTLEJOHN: It is, Your Honor.

11 THE COURT: Are you Alan -- Jeffrey
12 Alan Scofield?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: All right. Mr. Scofield,
15 I'm told that you want to plead guilty to
16 voyeurism. Communicating obscene messages to
17 another person without consent is what is on the
18 sentencing sheet. Is that the formal name for
19 voyeurism?

20 MR. COLLIER: No, Your Honor. There
21 might be a typo on the sentence sheet.

22 THE COURT: Okay.

23 MR. COLLIER: It's the correct -- it's
24 the correct statute number, Your Honor, but I
25 inadvertently put the incorrect name of the crime.

1 If it's okay with Debbie, if you could cross
2 through communicating obscene messages to another
3 person and write voyeurism. I think that would
4 solve the problem.

5 MS. LITTLEJOHN: I'm fine with that.

6 MR. COLLIER: It's the correct CDR code
7 as well, Judge.

8 EXAMINATION

9 BY THE COURT:

10 Q. Okay. So you want to plead guilty to
11 voyeurism, 0 to 3 years? Mr. Scofield?

12 A. Yes, sir.

13 Q. All right. Well, we normally do these
14 in the courtroom and we are not in the courtroom as
15 you can tell, so in order for me to take your plea,
16 you have to give up your right to have this done in
17 the courtroom. Are you all right with that?

18 A. I am.

19 Q. Now, we normally -- again, your lawyer
20 would be there beside you, but she is participating
21 on video. Raise your hand, Mrs. Littlejohn.

22 Do you see her there?

23 A. I do.

24 Q. If you need to talk with her during
25 this process, you just raise your hand and get my

1 attention and we will let her call you and you can
2 arrange to talk with her more privately. Okay?

3 A. Okay.

4 Q. Okay. Well, in the meantime, you have
5 to give up your right to a jury trial. When you
6 give up your right to a jury trial by pleading
7 guilty. If you want a trial, stop me and we will
8 arrange that for you.

9 State then has to present enough
10 evidence to convince 12 jurors that you are guilty
11 beyond a reasonable doubt. All 12 have to agree
12 that you are guilty in order to convict you, and if
13 convicted, you would have the right to appeal.

14 You could challenge the State's
15 evidence and put up evidence of your own; testify
16 if you want. If you don't want to testify, the
17 judge would tell the jury not to hold that against
18 you while deliberating. Do you understand those
19 rights?

20 A. I do.

21 Q. Do you want to give those rights up and
22 plead guilty?

23 A. Yes.

24 Q. Are you pleading guilty to this charge
25 because you are guilty of it?

1 A. Yes.

2 Q. Are you under the influence of drugs or
3 alcohol today?

4 A. No.

5 Q. Do you need any more time with your
6 lawyer?

7 A. No.

8 Q. Are you satisfied with her
9 representation?

10 A. Yes.

11 Q. Anybody promise you anything or
12 threaten you to plead guilty, other than they are
13 dropping another count of voyeurism?

14 A. No.

15 Q. How old are you?

16 A. Thirty-three.

17 Q. How far did you get in school?

18 A. I have a master's.

19 Q. And do you have a job?

20 A. Not currently.

21 Q. Did you have a job?

22 A. I did.

23 Q. What did you do?

24 A. I was the sports information director
25 at Bishop England High School for five years.

1 Q. Are you married?

2 A. No.

3 Q. Do you have children?

4 A. No, I do not.

5 THE COURT: Ms. Littlejohn, does he
6 understand what he's doing?

7 MS. LITTLEJOHN: Absolutely, Your
8 Honor.

9 THE COURT: All right. I find that his
10 plea is freely, voluntarily, and intelligently
11 made. What would the State like to tell me about
12 this case?

13 MR. COLLIER: Thank you, Your Honor.
14 David Collier for the attorney general's office.

15 I would like to add that voyeurism is a
16 mandatory sex offender registry charge.

17 Your Honor, in the spring of 2019,
18 several students at Bishop England High School,
19 which is on Daniel Island in Berkeley County, were
20 using a school-owned iPad to record an athletic
21 event. Apparently this iPad was shared among the
22 students and staff for this type of purpose.

23 The students at some point looked
24 through the camera roll on the iPad and found
25 several videos of boys who attended Bishop England

1 High School changing clothes in the boy's locker.
2 In the video the boys were never fully nude, but
3 they were in their boxer shorts.

4 On the camera roll of the iPad, the
5 students also found nude photos of the defendant
6 Jeffrey Alan Scofield. Mr. Scofield was then an
7 employee of Bishop England and served as attendance
8 clerk and also assisted in the athletic department.

9 The students quickly turned the iPad in
10 to the school administrators and the administrators
11 contacted the City of Charleston Police Department.

12 Mr. Scofield was interviewed by the
13 City of Charleston investigators, and he confessed
14 to placing the iPad in a window that faced the
15 boy's locker room and to secretly making the videos
16 of the boys while they changed clothes.

17 With the assistance from homeland
18 security investigations, a forensic examination was
19 conducted on the school iPad and on Mr. Scofield's
20 personal iPhone. Those examinations led to the
21 identification of five victims in the locker room
22 videos.

23 The boys were never nude in those
24 videos, but they were changing their clothes with
25 towels and in their underwear. The defendant was

1 arrested after the interview. And after he was
2 arrested, Investigator Brittany Harwell with the
3 City of Charleston secured a search warrant to look
4 for additional electronic devices at Mr. Scofield's
5 home.

6 Investigator Harwell is a member of the
7 attorney general's Internet Crimes Against Children
8 Task Force. Ms. Harwell seized five electronic
9 devices which were then forensically examined by
10 chief forensic investigator Chris Bobar with the
11 attorney general's Internet Crimes Against Children
12 unit, but, Your Honor, Investigator Bobar did not
13 find any additional files of interest in the case
14 on those devices.

15 These are the facts from the State,
16 Your Honor, and the defendant does not have a
17 record.

18 THE COURT: All right. And what is
19 your recommendation?

20 MR. COLLIER: No recommendation.

21 THE COURT: Ms. Littlejohn.

22 MS. LITTLEFIELD: Yes, Your Honor. As
23 you heard Mr. Scofield is 33 years of age and
24 attorney general's office is actually prohibited
25 from giving a recommendation.

1 This is a case we referenced to you
2 several weeks ago. Mr. Scofield fully cooperated.
3 He handed over everything that there was, and you
4 heard that the AG's office thinks there was nothing
5 additional found.

6 When we were preparing for cases to
7 come in, I said -- he, David Collier of the
8 attorney general office called and said, what do
9 you want to do with Mr. Scofield? Just kind of a
10 little bit of a risk thing to do. I said, why not?
11 Let's go ahead and do him.

12 And I asked him about it. I said, you
13 will have to come into our office because you're
14 allowed to have certain things. And so you can see
15 he's here in the public defender's office. Took a
16 while to get him into the office.

17 He has always been very cooperative
18 with our office. He was cooperative with the
19 police. He was cooperative with the attorney
20 general's office, et cetera. During the day he
21 helps his sister. She has lost both of her legs to
22 diabetes and he helps her out a lot.

23 So, Your Honor, we would just ask for a
24 probationary sentence. He does know he will be
25 very, very limited because being on the sex

1 offender registry, and I know the Court is very
2 much aware of how much that limits him.

3 This is a major embarrassment to him.
4 He had great potential and now he's having to
5 figure out what to do with his life at middle age
6 if you will, 33.

7 THE COURT: All right. Well, before I
8 hear from Mr. Scofield, were there members of the
9 victims' families that wanted to be heard or
10 they're just listening in?

11 MR. COLLIER: Your Honor, they are just
12 listening.

13 THE COURT: Okay. All right. Well,
14 Mr. Scofield, what would you like to tell me?

15 THE DEFENDANT: I would like to say
16 that I was just, obviously -- well, obviously, but
17 I was going through different things at that time
18 and really -- really where these thoughts came from
19 to do this was -- was not something that I -- have
20 even been able to figure out until now.

21 I didn't have these thoughts three
22 months before this happened or three years before
23 this happened. I can tell you that when I started
24 having thoughts about doing this, that I would have
25 these arguments in my head with myself because I

1 knew how wrong it was.

2 And I wish I could have had the courage
3 or trust in someone to go to someone about the
4 thoughts I was having because I probably could have
5 stopped this from happening, but I was obviously
6 embarrassed about telling somebody about these
7 types of things.

8 And, honestly, I think that's why in my
9 interview with the detective at the end I told him
10 I was relieved and not take part -- telling him
11 that was -- fact that I was finally able to tell
12 somebody kind of what I was battling for those few
13 weeks or months or so in my head.

14 I can honestly say ever since I was --
15 I got that out that I haven't had any thoughts
16 anymore close to that sense, nor do I plan to have
17 them in the future. I'm just really embarrassed
18 and ashamed for any type of embarrassment I brought
19 on to the victims in this case. Just really,
20 really hope to find a way to move forward from here
21 on out.

22 THE COURT: All right. Well, here's
23 what I'm going to do. I will give you a
24 probationary sentence and order you to undergo
25 mental health counseling.

1 If you are not being prosecuted for
2 your sexual orientation, I mean, it sounds to me
3 like if you're interested in taking pictures of
4 boys, you might very well be gay. Whether or not
5 you have come to that, I don't know, but what you
6 are prosecuted for is taking pictures of young
7 people who they don't give their consent and that's
8 against the law. That is something that you need
9 help with.

10 The State's not prosecuting you because
11 you may or may not be gay. They are prosecuting
12 you for taking pictures of a sexual nature with
13 people that do not give their consent.

14 So that's the thing that needs to be
15 addressed by you in my opinion. And so I will give
16 you two years in the Department of Corrections,
17 suspended upon you successfully completing 18
18 months of probation.

19 And while you are on probation I want
20 you to get some mental health counselling so that
21 you can talk to somebody about -- when you say
22 you're having -- you were -- you had some thoughts,
23 I assume that you were talking about photographing
24 people.

25 And that is something that is clearly

1 unacceptable behavior, especially people without
2 their consent.

3 And if they're under age and of a
4 sexual nature, that is something that you need to
5 learn to do something about and control if you got
6 these urges again.

7 The other thing, you know, that's --
8 you are going to have to work your way through
9 whatever issues you have in life, just like
10 everybody else does, but it's the taking pictures
11 of an unauthorized nature and having to deal with
12 those thoughts that obviously you had struggles
13 overcoming. That's what I need you to get help on.

14 MS. LITTLEJOHN: Where do they go to
15 report for probation?

16 PROBATION AGENT: Report immediately to
17 our office, 109 West Main, Moncks Corner.

18 THE COURT: Yeah. Where are you at
19 now?

20 MS. LITTLEJOHN: He's at our office.

21 PROBATION AGENT: We are five minutes
22 away.

23 THE COURT: When you hang up here, you
24 come over to the probation office to see Mr. Davis
25 and get signed up for probation.

1 MS. LITTLEJOHN: The old one, the
2 satellite or the main courthouse?

3 PROBATION AGENT: 109 North Main,
4 health department.

5 THE COURT: Over across from the
6 Subway.

7 PROBATION AGENT: Yes.

8 THE COURT: Do you know where he's
9 talking about? Somebody there can tell you where
10 he's at.

11 THE DEFENDANT: Okay.

12 THE COURT: Good luck.

13 MS. LITTLEJOHN: Thank you.

14 MR. COLLIER: Your Honor, just one
15 thing further from the State. We would ask that
16 during the term of probation that he be prohibited
17 from contacting the victims or their families.

18 THE COURT: Okay.

19 MS. LITTLEJOHN: That's no problem.

20 THE COURT: Okay. No contact with
21 victims or family members of the victim.

22 (These proceedings were concluded at
23 2:42 p.m.)

24

25

1 CERTIFICATE OF REPORTER

2

3 I, Carol Denise Lauder, Registered
4 Professional Reporter and Notary Public for the
5 State of South Carolina at Large, do hereby certify
6 that the foregoing transcript is a true, accurate,
7 and complete record.

8 I further certify that I am neither related
9 to nor counsel for any party to the cause pending
10 or interested in the events thereof.

11 Witness my hand, I have hereunto affixed my
12 official seal this 5th day of June, 2021, at
13 Charleston, Charleston County, South Carolina.

14

15

16

17 S/Carol Denise Lauder
18 Carol Denise Lauder
19 Registered Professional
20 Reporter, CP
My Commission expires
February 27, 2028

21

22

23

24

25

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EXHIBIT 6

THE RICHTER FIRM, LLC

Attorneys & Counselors at Law
622 Johnnie Dodds Boulevard
Mount Pleasant, South Carolina 29464

Lawrence E. Richter, Jr.
Jennifer S. Ivey*

Telephone: (843) 849-6000
Telefax: (843) 881-1400

*Also licensed in FL

May 7, 2019

Via Email: pfinneran@behs.com
Bishop England High School
Attn: Patrick Finneran, Principal
363 Seven Farms Drive
Daniel Island, SC 29492

Via Email: jsmith@catholic-doc.org
The Most Reverend Robert E. Guglielmone
Diocese of Charleston
901 Orange Grove Rd
Charleston, SC 29407

Re: Spoliation of Evidence re: Jeffrey Alan Scofield

Dear Principal Finneran and Bishop Guglielmone,

Please be advised that The Richter Firm, LLC has been retained by a known victim and potential victims in regards to the predatory and intrusive behavior by Jeffrey Alan Scofield and/or potentially others employed by Bishop England High School and the Diocese. During the pendency of this matter, or until further notice, or upon order of the Court, you, your agents, your employees, and anyone else within your knowledge or control must take reasonable steps to preserve every document, data, or tangible thing in your possession, custody or control, containing information that is relevant to, or may reasonably lead to the discovery of information relevant to, the subject matter involved in the potential litigation.

The documents, data, and tangible things subject to this notice include, but are not limited to, the following:

(a) Documents, data, and tangible things evidencing the child sex abuse, voyeurism, and any and all other illegal acts of Jeffrey Alan Scofield and/or other employees, or agents of the Diocese who have committed similar acts in, on, or around Diocese facilities or involving students of Diocesan schools, including but not limited to, schools and facilities that are specifically designed and configured to provide viewing areas of less than fully-clothed minors;

(b) Documents, data, and tangible things evidencing the design and configuration of Diocese schools and facilities that provide areas to view less than fully-clothed minors;

(c) Documents, data, and tangible things evidencing past allegations of child sex abuse, voyeurism, and any and all other illegal acts by other coaches, employees, or agents of the Diocese in, on, or around Diocese schools and facilities and/or involving students of Diocesan schools, including, but not limited to, Diocese schools and facilities that are specifically designed and configured to provide areas to view of less than fully-clothed minors, such as the subject locker rooms at Bishop England High School;

(d) Documents, data, and tangible things evidencing communications (internal or external) concerning the above described subject matter, including any potential defenses that may be asserted;

(e) Documents, data, and tangible things evidencing policies and procedures governing retention of documents, data, or other matter collected, created, or assembled by you, your agent(s), your employee(s), or any known third party regarding the above described subject matter, including any potential defenses that may be asserted, including policies pertaining to litigation;

(f) Documents, data, and tangible things evidencing or relating to destruction of records pertaining to any of the above described records, documents, or data;

(g) Documents, data, and tangible things evidencing communications to preserve potentially relevant evidence concerning any claims relating to the above described subject matter, including any potential defenses that may be asserted.

For the purposes of this notice, “documents, data, and tangible things” includes, but is not limited to: records; files; correspondence; reports; memoranda; calendars; diaries; minutes; electronic messages; voicemails; E-mails; telephone message records or logs; computer and network activity logs; hard drives; backup data; removable computer storage media such as tapes, disks, and cards; printouts; document image files; Web pages; databases; spreadsheets; software; books; ledgers; journals; orders; invoices; bills; vouchers; checks; statements; worksheets; summaries; compilations; computations; charts; diagrams; graphic presentations; drawings; films; charts; digital or chemical process photographs; video; phonographic tape; or digital recordings or transcripts thereof; drafts; jottings; and notes. Information that serves to identify, locate, or link such material, such as file inventories, file folders, indices, and metadata, is also included in this definition.

This notice is issued as an alert to maintain and preserve the integrity of all documents, data, and tangible things identified herein and any other evidence that you reasonably anticipate may be subject to discovery under Rules 26-37, 45, and 56 of the South Carolina Rules of Civil Procedure should litigation ensue, specifically including drawings, plans, meeting notes, contracts and any matter whatsoever related in any way to the planning, design, or construction of Bishop England High School.

Please be mindful of the consequences that result from a finding that evidence was despoiled, which can include, but are not limited to procedural bars to claim(s) or defense(s), spoliation instruction to the jury, and/or sanctions, and in doing so, take any and all appropriate steps to prevent the partial or full destruction, alteration, testing, deletion, shredding, incineration, wiping, relocation, migration, theft, or negligent or intentional mishandling of such material that would make same incomplete or inaccessible. In considering these consequences, please also bear in mind the nature of the claims involved, who the victims are, who the perpetrator(s) are, and their relationships with the Diocese.

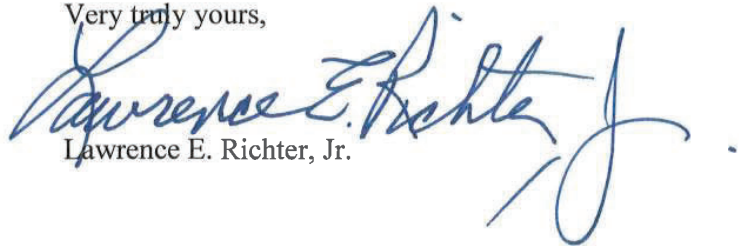
The Bishop and Diocese counsel of record known in other sex abuse matters now pending is copied on this correspondence so that it can be clear from the outset of this engagement of the potential issue of spoliation. Mr. Dukes, please heed the same directives detailed herein with respect to any documents, data, and tangible things you may possess relevant to the subject matter addressed herein and any potential defenses, as well as your ethical duties under Rule 3.4 of the Rules of Professional Conduct and/or otherwise.

To the extent that you, your employees, or your agents, including Mr. Dukes, are aware of any documents, data, tangible things relevant to the subject matter described herein that is in the possession or control of third parties, please immediately identify those parties to me so that we may take steps to alert those parties to preserve the evidence.

So as to afford me a more full and accurate understanding of the area in question, or scenes of the crimes, I would like to physically view and inspect live the area involved. I would appreciate you agreeing to such inspection at the earliest possible time. Please notify me right away when I may come. Of course, representatives of the FBI, the Charleston Police Department, and the Diocese of Charleston are welcome to attend.

Thank you for your immediate attention to this matter.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Lawrence E. Richter, Jr.", with a large, stylized flourish at the end.

Lawrence E. Richter, Jr.

LER/jsi

cc: Richard S. Dukes, Jr., Esq. (Via Email: RDukes@TurnerPadget.com)

EXHIBIT 7

Page 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

DEPOSITION OF PATRICK FINNERAN

OCTOBER 5, 2021

GARY NESTLER, VIEWED STUDENT FEMALE 200, VIEWED
STUDENT MALE 300, on behalf of themselves and all
others similarly situated,

Plaintiffs,

vs.

CASE NO. 2:21-cv-0613-RMG

THE BISHOP OF CHARLESTON, A CORPORATION SOLE;
BISHOP ENGLAND HIGH SCHOOL; TORTFEASORS 1-10; THE
BISHOP OF THE DIOCESE OF CHARLESTON, in his
official capacity; and ROBERT GUGLIELMONE,
Individually,

Defendants.

TIME: 9:10 AM

LOCATION: THE RICHTER LAW FIRM
MOUNT PLEASANT, SOUTH CAROLINA

REPORTED BY: RONDA K. BLANTON, RPR
CLARK & ASSOCIATES, INC.
CHARLESTON, SC 29422
843-762-6294
WWW.CLARK-ASSOCIATES.COM

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1 about documents but not actually physically the
2 building itself.

3 Q. So in one part of the letter, it talks
4 about the documents include the windows and
5 another part of the letter it doesn't include the
6 windows. Is that where the hang-up is? Trying
7 to reconcile the difference?

8 A. Yes.

9 Q. It doesn't mean that the document
10 doesn't -- okay. Is there a reason why the
11 windows were altered despite having received this
12 letter?

13 A. So at this time the windows were boarded
14 up because we had some concerns from parents; and
15 so after a year of them being boarded and having
16 the boards on the windows, we decided to go ahead
17 and brick them in because it was a -- somewhat of
18 an eyesore.

19 Q. What parents gave you concerns?

20 A. Just feedback that I get from parents.
21 I could not tell you their names at this point.

22 Q. When did that feedback come in?

23 A. After the original statement was made.

24 Q. All right. After which --

25 A. The original statement -- not this one,

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1 but a statement about Mr. Scofield's arrest.

2 Q. So after Mr. Scofield's arrest took
3 place is when parents learned about the fact
4 there are windows in the coaches' office looking
5 into the locker rooms?

6 MR. DUKES: Object to the form.

7 A. I don't know if that's when they learned
8 about it, but there were some concerns about it
9 at that point.

10 Q. Do you have knowledge that the parents
11 were aware of the fact windows were in the
12 coaches' office looking into the locker rooms
13 before that?

14 A. I do not.

15 Q. This isn't the only letter that you
16 received, which I'll call -- which is called a
17 spoliation letter. You've received other
18 correspondence advising you not to destroy or
19 alter the windows; isn't that correct?

20 A. I -- I don't remember.

21 Q. I'll represent to you that in a -- in a
22 different meeting, there was communications given
23 between your lawyer --

24 MR. DUKES: Object to the form.

25 Q. -- and this is -- between your lawyer

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1 and the counsel in this case addressing the fact
2 that he himself had written a letter --

3 MR. DUKES: That's not what I said,
4 and that's --

5 Q. -- advising not to alter. Is that not
6 correct?

7 MR. DUKES: I'm going to instruct
8 him not to answer that question because it's
9 covered by the attorney-client privilege.

10 Q. Do you dispute having received any other
11 letters regarding not altering windows?

12 A. I just don't recall.

13 Q. Fair enough.

14 MR. SLOTCHIVER: Let's mark this as
15 an exhibit, please.

16 (Exhibit No. 02 was marked for
17 identification.)

18 Q. Was the decision to board up the windows
19 based solely on the parents' concerns?

20 A. Yes.

21 Q. It had nothing to do with meetings with
22 the superintendent?

23 A. I mean, it -- it was probably part of
24 discussion with them, the concerns from parents.
25 We were not instructed to board the windows up,

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1 Q. You mentioned you did talk to a parent
2 from LS3P. Who was that?

3 A. I cannot remember. I don't remember the
4 parent. He just told me that's -- that's what he
5 did. I don't remember his name.

6 MR. SLOTCHIVER: Can we -- I know
7 it's part of the transcript; but just for clarity
8 can we admit this as an exhibit, please.

9 (Exhibit No. 06 was marked for
10 identification.)

11 MR. SLOTCHIVER: Let's take a quick
12 break, and we're about done.

13 (A recess was taken 11:14 a.m. to 11:24 a.m.)

14 BY MR. SLOTCHIVER:

15 Q. Mr. Finneran, thank you. We're about
16 done. Probably three minutes.

17 Where could I go to see the window and
18 blinds that were taken out of the school?

19 A. I don't know.

20 Q. Where would they have been -- were
21 they -- are they preserved in a storage facility
22 somewhere?

23 A. I don't think so.

24 Q. Well, was the evidence not saved?

25 MR. DUKES: Object to the form.

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1 A. We saved the evidence that we had, yes.

2 Q. So you would have -- I mean, knowing
3 that the window was part of the issue and having
4 received the spoliation letter, I'm assuming
5 somewhere you would have saved the windows and
6 the blinds; correct?

7 A. Not that I know of, no.

8 Q. Who made the decision not to save the
9 windows and the blinds that were in the coaches'
10 office looking into the locker rooms?

11 A. The decision was to -- after boarding
12 them up after it happened was to brick them in.

13 Q. I understand.

14 Who made the decision? In light of the
15 spoliation letter, who made the decision not to
16 save them?

17 A. There was no discussion about that. So
18 the decision was to block them in.

19 Q. I mean, we can, to some extent, you
20 know, look and understand some things; but we
21 don't have -- for example, do you have -- there's
22 nowhere that it's been saved?

23 A. Not that I know of, no.

24 Q. How -- what was the timeliness in
25 conjunction with the removing of the windows and

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1 closing it up? Not the boarding it up but the
2 closing them up.

3 When you actually took the windows and
4 the blinds out, what was the time between that
5 and when they would have been discarded?

6 A. I don't know. I mean, I don't know when
7 they were discarded.

8 Q. Do you know if --

9 A. I don't know that either.

10 Q. Do you know who would know the answer to
11 whether or not they were discarded?

12 A. I don't know. We had a company come in
13 and replace the windows with block.

14 Q. The company that came to replace the
15 window with blocks, that was a friend; correct?
16 Friend of the school?

17 A. Well, he's a contractor, does work; but
18 his kids go to the school, yes.

19 Q. Did he charge the school any money?

20 A. He actually did, yes.

21 Q. Do you have a copy of that paperwork
22 anywhere?

23 A. I do not have it, no.

24 Q. Who would have it?

25 A. It would be with our bookkeeper.

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1 Q. So if we request it, you would have
2 saved that document?

3 A. Yes.

4 Q. Is it possible that the contractor --
5 who was the contractor, by the way?

6 A. It's -- Mr. Dennis is -- is the
7 gentleman. I cannot remember the name of his
8 company.

9 Q. Is it possible that the company would
10 have preserved the windows and the blinds?

11 A. I don't know.

12 Q. Would you agree with me that the amount
13 of space taken to preserve the 4 x 4 windows and
14 the blinds would have been minimal?

15 MR. DUKES: Object to the form.

16 A. I don't know what space requirements
17 that you have as far as any warehouse for that
18 kind of stuff.

19 Q. It's a 4 foot x 4 foot window; correct?

20 A. I understand the size, yes.

21 Q. There's three of them; correct?

22 A. There were three of them, yes.

23 Q. They purportedly could stack on top of
24 each other?

25 A. You could, yes.

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1 Q. And then you had blinds in the windows
2 that are already in the windows; correct?

3 A. I cannot remember where the blinds were
4 hung. If they were inside, on the windows
5 themselves, or just inside the sill part of it.

6 Q. Were they the same blinds from the time
7 you came to the school until the time the windows
8 came out?

9 A. They haven't changed, no. They were
10 still there.

11 Q. Just to be clear, you don't know if the
12 windows or the glass was preserved. But you can
13 try to find out; correct?

14 A. I could ask, yes.

15 Q. Would it have been -- in light of this
16 spoliation letter, would it have been the
17 instruction -- who would have had -- I'll ask it
18 differently because I'm jumping around.

19 Who made the decision to pull the
20 windows out? Was that you, or was that the
21 Diocese?

22 A. The request to take the windows out
23 would have been mine.

24 Q. And who made the arrangements to pull
25 the windows out?

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1 A. So our Director of Operations, Mike
2 Darnell, spoke with Mr. Dennis about arranging
3 that part of it.

4 Q. When you receive -- well, let's go back
5 to the spoliation letter.

6 When you receive communications such as
7 this one, do you file it; or do you share it with
8 other people?

9 A. So you --

10 Q. Let's pull the exhibit. I think it's
11 Exhibit No. 01.

12 A. It's Exhibit No. 02.

13 Q. I think it was copied to somebody else
14 also.

15 A. It was copied to the Bishop.

16 Q. So when you received it, did you
17 communicate with anybody about this?

18 A. Yes.

19 Q. Who would you have spoken to?

20 A. I spoke to Miss Tucker, who's the
21 associate principal.

22 Q. And what did you and she talk about?

23 A. To save all the emails, documents, that
24 kind of stuff.

25 Q. Did you -- I'm not asking what you spoke

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1 to a lawyer about, but did you consult with a
2 lawyer about this letter?

3 A. We would have had discussion about it,
4 yes.

5 Q. When you say "we," you mean you and
6 Miss Tucker; or you and a lawyer would have had
7 discussions?

8 A. Mr. Dukes and I would have had
9 discussions.

10 Q. You certainly got the letter. You
11 talked to Miss Tucker about the letter; correct?

12 A. What -- I don't remember getting the
13 letter; but if I could have, if I did get the
14 letter, I'm assuming we did because it's
15 addressed to me. Then, yes, I would have talked
16 to Miss Tucker.

17 Q. So we may be able to ask Miss Tucker
18 about the conversations. Maybe she'll know.

19 A. She might remember, yes.

20 Q. Did you understand that the letter
21 wasn't written that would -- I'll say it
22 differently.

23 You understand the letter was written to
24 you, not Miss Tucker; correct?

25 A. Yes.

1 Q. And it was written to you and not to
2 Mr. Dukes, your lawyer; correct?

3 A. Yes.

4 Q. And the duty has been set forth on you
5 as the principal; correct?

6 A. I understand that, yes.

7 Q. Did you make any efforts to protect the
8 window? It sounds like you may have because you
9 said you don't know where it is, but did you make
10 any effort to protect the window or the blinds
11 and to preserve them?

12 A. No, not that I -- no. I don't know what
13 they did with the windows when they took them
14 out.

15 Q. Do you understand that without that
16 evidence, that can affect our investigation
17 'cause we don't have the actual windows or the
18 actual blinds to look at? You understand why
19 it's important?

20 MR. DUKES: Object to the form.

21 A. That -- but you already came and took
22 pictures of all those things. You had the -- you
23 looked at all those when they were still in
24 there.

25 Q. So did you believe that by the fact that

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1 we went there, that eradicated this letter?

2 A. No.

3 Q. You understand without looking --
4 without being able to look at it and to see it
5 and to bring an expert to actually look at it, we
6 don't have the opportunity to have a full
7 investigation as much as we might have liked to
8 have had?

9 MR. DUKES: Object to the form.

10 A. I don't know the answer to that
11 question. I don't do those things.

12 Q. Not what you do. Okay.

13 Were the windows single glass, double
14 glass, compressed glass?

15 A. I don't know. I -- truthfully, I don't
16 remember.

17 Q. I mean, those are things that wouldn't
18 necessarily show up on a photograph; correct?

19 A. They may. I don't know.

20 Q. Those are things that if we had an
21 opportunity to look at it, we could tell;
22 correct?

23 MR. DUKES: Object to the form.

24 A. I guess so, yes. I don't know.

25 Q. And the same thing with the blinds. You

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1 know, how -- were the blinds relatively new?
2 Were they old? Were they beat up? Did they
3 work?

4 A. They worked, yes.

5 Q. How do you know they worked? Did you
6 ever use the blinds?

7 A. I never used them, but they were closed.
8 So they had to work.

9 Q. Well, they were closed. And I believe
10 your testimony was whenever you were in the
11 office, they were closed; correct?

12 A. Yes.

13 Q. Were they closed, or did they appear to
14 be closed?

15 MR. DUKES: Object to the form.

16 Q. Could you distinguish those two things?

17 A. Yes. They were closed.

18 Q. When you were in the locker room, were
19 they closed; or did they appear to be closed?

20 A. I don't ever remember looking at them
21 from the locker room.

22 Q. Fair enough.

23 Was it -- are you the one that was --
24 that collected faculty handbooks for us?

25 A. With the assistance of Miss Tucker, yes,

EXHIBIT 8

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

C/A No.: 2:21-cv-00613-RMG

Tuition Payer 100, Viewed Student Female
200, Viewed Student Male 300, on behalf of
themselves and all others similarly situated,

Plaintiffs,

vs.

The Bishop of Charleston, a Corporation Sole,
Bishop England High School, Tortfeasors 1-
10, The Bishop of the Diocese of Charleston,
in his official capacity, and Robert
Guglielmone, individually,

Defendants.

**DIOCESE DEFENDANTS' RESPONSES
TO PLAINTIFFS' FIRST REQUESTS
FOR PRODUCTION**

Diocese Defendants, by and through undersigned counsel, respond to Plaintiffs' First Requests for Production as follows:

RESPONSES TO REQUESTS FOR PRODUCTION

1. Please produce all photographs, files, diagrams, documents, or other tangible items which any responding Defendant or Defendant's counsel may have, have control of, or have access to which relate to the matters alleged in the Complaint.

RESPONSE:

The Diocese has searched available records and has located documents bates labeled BEHS_000001 through BEHS_0000588. The Diocese continues its search and will supplement should any additional documents be located.

2. Please produce all statements given by any witnesses which are in the possession of, or can be reasonably obtained by, any responding Defendant or his or its attorney(s), whether written, or

recorded, or on a tape recorder, or otherwise, which relate to the matters complained of in the Complaint herein or to the Defendant's Answers and defenses.

RESPONSE:

The Diocese has not located any statements that are responsive to this request.

3. Please produce all statements, memoranda, reports, affidavits, or other materials which in any other way might relate to the Plaintiffs claims or to any responding Defendant's defenses herein which are within possession or control or can be reasonably obtained by any responding Defendant or his or its attorney(s), whether written or recorded, or on a tape recorder or otherwise.

RESPONSE:

The Diocese objects to Request No. 3 to the extent Plaintiff seeks information that is beyond that which is required for the Court to determine issues related to class certification under Rule 23 Fed.R.Civ.P., and to the extent the Request not proportionate to the needs of the case. Subject to the stated objection, the Diocese has search available records and has located documents bates labeled BEHS_000001 through BEHS_0000588. The Diocese continues its search and will supplement should any additional documents be located.

4. Please produce all correspondence between responding Defendant, the Diocese of Charleston, and/or higher offices within the Roman Catholic Church that relate in any way to the claims, defenses, or facts of this case.

RESPONSE:

The Diocese has produced copies of correspondence with Rome regarding the sale of the former Bishop England High School and the acquisition of property and construction of the new BEHS.

5. Please produce any insurance policy that may provide coverage in any way relating to the claims, defenses, or facts of this case.

RESPONSE:

The Diocese will supplement to provide the Declarations Page of its policy.

6. Produce any and all documents by which parents, guardians, custodians, or tuition payers were informed that children would be viewed through the subject windows and may be seen in varying states of dress and nudity upon their enrollment as students at Bishop England High School (BEHS).

RESPONSE:

The Diocese objects to Request No. 6 to the extent Plaintiff seeks information that is beyond that which is required for the Court to determine issues related to class certification under Rule 23 Fed.R.Civ.P. and not proportionate to the needs of the case.

7. Produce any and all documents that parents, guardians, custodians, or tuition payers were required by any Defendant to sign before their children or the person(s) for whom they were paying tuition, notifying such person that each student would, upon becoming a student at BEHS, be subject to viewing by third parties while such students were in various states of dress and or nudity, from January 1, 1998 to date.

RESPONSE:

The Diocese objects to Request No. 7 to the extent Plaintiff seeks information that is beyond that which is required for the Court to determine issues related to class certification under Rule 23 Fed.R.Civ.P. The Diocese further objects to Request No. 7 to the extent it implies that anyone was authorized “to viewing by third parties while such students were in

various states of dress and or nudity,” because coaches and staff were only authorized to monitor the locker rooms for student safety.

8. Produce copies of the Annual, Bi-Annual, or Semi-Annual Report of BEHS for the years 1998 to date.

RESPONSE:

The Diocese is compiling documents responsive to Request No. 8 and will supplement.

9. Produce copies of any document in the possession or control of any Defendant herein or his, her or its agent or attorney, which document shows or in any way states the value of BEHS. This request includes but is in no way limited to financial statements, insurance applications, declaration pages, and policies.

RESPONSE:

The Diocese objects to Request No. 9 to the extent Plaintiff seeks information that is beyond that which is required for the Court to determine issues related to class certification under Rule 23 Fed.R.Civ.P.

10. Produce any and all construction plans, or design documents for the viewing windows which are the subject of this action prepared by BEHS, LS3P, Gulf Stream Construction or any other design professional, engineer, or contractor.

RESPONSE:

The Diocese has copies of the plans or design documents prepared by LS3P and will produce same.

11. Produce any correspondence regarding Number 10 by and between BEHS, LS3P and Gulf Stream Construction.

RESPONSE:

The Diocese has searched available records and has located documents bates labeled BEHS_000001 through BEHS_0000588. The Diocese continues its search and will supplement should any additional documents be located.

12. Produce any and all policies and procedures concerning safety at BEHS in effect from 1998 to the present.

RESPONSE:

The Diocese has produced BEHS' Faculty Handbook and Student / Parent Handbook. The Policy on Protection of Children is available online. The Diocese continues its search and will supplement should any additional documents be located.

13. Produce any and all security or safety records from BEHS from 1998 to the present related to any incident in any locker room, adjacent office, or athletic personnel office containing a viewing window.

RESPONSE:

The Diocese continues its search for documents responsive to Request No. 13 and will supplement should any documents be located.

14. Produce any and all documents concerning complaints by students, alumni or parents relating to the windows which are the subject of this action from 1998 to the present.

RESPONSE:

The Diocese has not located any documents responsive to Request No. 14. The Diocese continues its search and will supplement should any responsive documents be located.

15. Produce any and all incident reports relating to violations of school safety, security, or privacy issues from 1998 to the present.

RESPONSE:

The Diocese continues its search for documents responsive to Request No. 15 and will supplement should any documents be located.

16. Produce the BEHS code of student conduct for each of the years from 1998 to the present.

RESPONSE:

The Diocese continues its search for documents responsive to Request No. 16 and will supplement should any documents be located.

17. Produce any and all records from BEHS related to or concerning sexual exploitation of students by faculty members / teachers. You may substitute the victim names with pseudonyms so long as you send us the actual names of same under separate cover.

RESPONSE:

The Diocese objects to Request No. 17 to the extent Plaintiff seeks information that is beyond that which is required for the Court to determine issues related to class certification under Rule 23 Fed.R.Civ.P. and that the Request is not proportionate to the needs of the case, nor does it relate to any claim or defense in this case.

18. Regarding Gulf Stream and/or any other general contractor, if there was such, produce a copy of the full contract with Gulf Stream Construction for the construction of the school including all supplemental, general, other conditions, addenda, modifications, and change orders.

RESPONSE:

The Diocese has searched available records and has located documents bates labeled BEHS_000001 through BEHS_0000588. The Diocese continues its search and will supplement should any additional documents be located.

19. Produce a copy of the resume of the lead Gulf Stream Construction contractor, or any other lead contractor, that was involved in the design, drawing, and construction of BEHS.

RESPONSE:

The Diocese has searched available records and has located documents bates labeled BEHS_000001 through BEHS_0000588. The Diocese continues its search and will supplement should any additional documents be located.

20. Produce a copy of the Gulf Stream Construction compensation agreement and copies of any checks, wires, or any other forms of payment showing how Gulf Stream Construction was paid for the BEHS construction project and how much it was paid.

RESPONSE:

The Diocese has searched available records and has located documents bates labeled BEHS_000001 through BEHS_0000588. The Diocese continues its search and will supplement should any additional documents be located.

21. Regarding LS3P and/or any other lead architectural firm, produce a copy of the contract with LS3P for the design/construction of the school including all supplemental, general, other conditions, addenda, modifications, and change orders.

RESPONSE:

The Diocese has searched available records and has located documents bates labeled BEHS_000001 through BEHS_0000588. The Diocese continues its search and will supplement should any additional documents be located. The Diocese further refers to the documents produced by LS3P in response to Plaintiffs' subpoena.

22. Produce a copy of the resume of the lead architect at LS3P, or any other lead architect, that was involved in the design, drawing, and construction of BEHS.

RESPONSE:

The Diocese has searched available records and has located documents bates labeled BEHS_000001 through BEHS_0000588. The Diocese continues its search and will supplement should any additional documents be located. The Diocese further refers to the documents produced by LS3P in response to Plaintiffs' subpoena.

23. Produce a copy of the LS3P compensation agreement and copies of any checks, wires, or any other forms of payment showing how LS3P was paid for the BEHS construction project and how much it was paid.

RESPONSE:

The Diocese has searched available records and has located documents bates labeled BEHS_000001 through BEHS_0000588. The Diocese continues its search and will supplement should any additional documents be located. The Diocese further refers to the documents produced by LS3P in response to Plaintiffs' subpoena.

24. Produce a copy of any and all permitting and design or any other approvals received from the City of Charleston or Berkeley County for the construction of BEHS on Daniel Island.

RESPONSE:

The Diocese has searched available records and has located documents bates labeled BEHS_000001 through BEHS_0000588. The Diocese continues its search and will supplement should any additional documents be located. The Diocese further refers to the documents produced by LS3P in response to Plaintiffs' subpoena.

25. Produce a copy of all bids that were received for the construction of BEHS on Daniel Island.

RESPONSE:

The Diocese has searched available records and has located documents bates labeled BEHS_000001 through BEHS_0000588. The Diocese continues its search and will supplement should any additional documents be located. The Diocese further refers to the documents produced by LS3P in response to Plaintiffs' subpoena.

26. Produce a copy of the preservation letter sent to BEHS and/or the Diocese of Charleston by Richard Dukes, redacted so as not to include any strategy or attorney-client privileged material which Richard Dukes told Plaintiffs' counsel about during the 26(f) conference on May 25, 2021.

RESPONSE:

The Diocese objects to Request 26 to the extent Plaintiffs seek production of any communication that is within the attorney-client privilege or work product doctrine. Subject to the stated objection, the preservation letter sent by Plaintiffs' counsel was forwarded to various diocesan officials who may possess documents that were the subject of counsel's preservation letter.

27. Please produce a copy of the reports for all disciplinary infractions that have occurred in the dressing rooms and/or locker rooms from 1998 to date as referenced in Interrogatory #8 to Defendant Bishop England High School.

RESPONSE:

The Diocese continues its search for documents responsive to Request No. 13 and will supplement should any documents be located.

28. Please produce a copy of the reports for all disciplinary infractions that have occurred in the bathrooms from 1998 to date as referenced in Interrogatory #9 to Defendant Bishop England High School.

RESPONSE:

The Diocese continues its search for documents responsive to Request No. 13 and will supplement should any documents be located.

29. Please provide the building committee meeting minutes as referenced in Interrogatory #25 directed to Defendant The Bishop of Charleston, a Corporation Sole.

RESPONSE:

The Diocese has searched available records and has located documents bates labeled BEHS_000001 through BEHS_000588. The Diocese continues its search and will supplement should any additional documents be located. The Diocese further refers to the documents produced by LS3P in response to Plaintiffs' subpoena.

30. Produce any documents, emails, or press releases that any of the Defendants sent to parents, students and/or the media alerting them about the 2019 Scofield incident.

RESPONSE:

The letters sent to parents after the incident involving Jeffrey Scofield will be produced.

TURNER, PADGET, GRAHAM & LANEY, P.A.

July 12, 2021

By: s/Richard S. Dukes, Jr.

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ATTORNEYS FOR DIOCESE DEFENDANTS

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

CIVIL ACTION NUMBER: 2:21-cv-613-RMG

Gary Nestler, *et al*,

Plaintiffs,

v.

The Bishop of Charleston, a Corporation
Sole, *et al*,

Defendants.

**DEFENDANTS' REPLY IN SUPPORT OF
THEIR MOTION FOR SUMMARY
JUDGMENT**

As the Court found and determined both in its Order denying class certification [Dkt. 84] and its Order denying reconsideration [Dkt. 95] the record before the Court reflects that *these* Plaintiffs in *this* case cannot prove the essential elements of the claims alleged in the Amended Complaint. By their own testimony, the Plaintiffs have shown they suffered no legally cognizable injury as a result of the matters alleged. By their own admission, Plaintiffs cannot establish any claim against any Defendant. The record clearly and unequivocally reflects that there remain no genuine issues of fact and Defendants are entitled to judgment as a matter of law on all claims. No additional discovery can change that – the Plaintiffs claims fail as a matter of law and should be dismissed.

Without a shred of evidence to support their meritless claims, summary judgment is appropriate and Plaintiffs' claims should be dismissed with prejudice.

Respectfully submitted,

TURNER PADGET GRAHAM LANEY, PA

s/Richard S. Dukes, Jr.

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ATTORNEYS FOR DIOCESE DEFENDANTS

June 13, 2022

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

Gary Nestler, <i>et al.</i> ,)	Civil Action No. 2:21-cv-613-RMG
)	
Plaintiffs,)	
)	
v.)	
)	
The Bishop of Charleston, a Corporation)	ORDER
Sole, <i>et al.</i> ,)	
)	
Defendants.)	
)	

Before the Court is Defendants' motion for summary judgment (Dkt. No. 85). For the reasons set forth below, the Court grants Defendants' motion.

I. Background

On March 24, 2022, the Court denied Plaintiffs’ motion for class certification. (Dkt. No. 84) (the “Prior Order”). The Court found, inter alia, that each named plaintiff lacked standing to pursue their respective claims. (*Id.* at 12-14).

On May 24, 2022, the Court denied Plaintiffs' motions for reconsideration. (Dkt. No. 95).

Defendants move for summary judgment. (Dkt. Nos. 85, 99). Plaintiff opposes. (Dkt. No. 98).

Defendants' motion is fully briefed and ripe for disposition.

II. Legal Standard

Summary judgment under Rule 56 of the Federal Rules of Civil Procedure should be granted only where “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Facts are material where they “might affect the outcome” of the case, and a “genuine issue” exists where the evidence would allow a

reasonable jury to return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Further, the nonmoving party's evidence “is to believed, and all justifiable inferences are to be drawn in his favor.” *Id.* at 255.

III. Discussion

In its Prior Order, the Court denied Plaintiffs’ motion for class certification on the basis that the proposed classes were fail-safe classes and not ascertainable, that neither predominance nor superiority were met, and that the named Plaintiffs lacked standing. The Court noted that crucial to all of Plaintiffs’ claims was a finding that an individual was either viewed or had a child who was viewed while attending Bishop England High School during the applicable time period through a particular glass window in the locker rooms. (Dkt. No. 84 at 7 n.2) (noting that Plaintiffs’ negligence, unjust enrichment, and warranty claims turned on a finding that an individual was viewed); (*Id.* at 9) (holding that South Carolina law explicitly required actual viewing to establish the tort of wrongful intrusion into private affairs); *Snakenberg v. Hartford Cas.*, 299 S.C. 164, 171-72 (Ct. App. 1989) (The cause of action for wrongful intrusion into private affairs consists of (1) an intentional (2) intrusion, (3) which is substantial and unreasonable, (4) into that which is private.); *Id.* at 172 (Damages “consist[] of the unwanted *exposure* resulting from intrusion.”) (emphasis added); *O’Shea v. Lesser*, 308 S.C. 10, 17-18 (1992) (Where “a plaintiff bases an action for invasion of privacy on ‘intrusion,’ bringing forth no evidence of public disclosure, it is incumbent upon him to show a blatant and shocking disregard of his rights, and serious mental or physical injury or humiliation to himself resulting therefrom.”) (*citing Rycroft v. Gaddy*, 281 S.C. 119 (Ct. App. 1984)). In the Prior Order, the Court noted that none of the named plaintiffs had put forth evidence of being viewed and thus lacked standing to pursue their claims. *See* (Dkt. No. 84 at 13-14) (“[A]s . . . detailed *supra*, neither Viewed Student Female 200 nor Viewed Male Student

300 testified to having been viewed by anyone Nor did Nestler testify that his daughter had been viewed.”).

The Court finds that Defendants are entitled to summary judgment. As established by the Prior Order, none of the named Plaintiffs can establish that they suffered a legally cognizable injury. (Dkt. No. 84 at 7 n.2, 12-13) (noting that testimony from the named plaintiffs established none had been viewed and that, therefore, “none of these individuals suffered an ‘intrusion’ under *Snakenberg*, or an otherwise concrete harm”) (internal citation omitted). Accordingly, as Plaintiffs “[b]y their own admissions . . . cannot establish any claim against any Defendant,” *see* (Dkt. No. 99 at 1), Defendants are entitled to judgment as a matter of law.

IV. Conclusion

For the reasons stated above, Defendants’ motion for summary judgment (Dkt. No. 85) is granted. The Clerk is directed to close this case.

AND IT IS SO ORDERED.

s/ Richard M. Gergel
Richard M. Gergel
United States District Judge

June 17, 2022
Charleston, South Carolina

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Gary Nestler,)	Civil Action No. 2:21-cv-613-RMG
Viewed Student Female 200,)	
Viewed Student Male 300,)	
on behalf of themselves and all others)	
similarly situated,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
The Bishop of Charleston, a Corporation)	NOTICE OF APPEAL
Sole, Bishop England High School,)	
Tortfeasors 1-10, The Bishop of the Diocese)	
of Charleston, in his official capacity, and)	
Robert Guglielmone, individually,)	
)	
Defendants.)	
_____)	

Notice is hereby given that Plaintiffs hereby appeal to the United States Court of Appeals for the Fourth Circuit from the District Court's Order/Judgment entered in this action on the 17th day of June, 2022 (ECF 100) as to all grounds upon which the Court granted relief in the form of summary judgment to the Defendants, and from all opinions and orders that merge therein.

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Dated: July 12, 2022

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Plaintiffs' Notice of Appeal* was served on the attorney(s) of record listed below by delivering a copy of the same via the CM/ECF electronic filing system and/or by U.S. mail, first class, postage prepaid to the following addresses:

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